TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 84.

UNION REFRIGERATOR TRANSIT COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY, BY W. L. WELLER, JR., REVENUE AGENT.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED AUGUST 19, 1904.

(19,447.)

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1 Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, Kentucky, on the 5th Day of May, A. D. 1904.

COMMONWEALTH OF KENTUCKY, by WILLIAM L. WELLER, JR., Revenue Agent for Jefferson County, Appellant,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Appellee.
} Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Be it remembered that heretofore, to-wit: on the 15th day of December, 1903, the appellant by his attorney filed in the office of the clerk of the court of appeals a transcript of record, in words and figures following, to-wit:

STATE OF KENTUCKY,
County of Jefferson.

#34425.

Pleas before the Honorable Shackelford Miller, judge of the
2 Jefferson circuit court, chancery branch, first division, at the court house, in the city of Louisville, county and State aforenamed, and on dates hereinafter mentioned.

THE COMMONWEALTH OF KENTUCKY, by, etc., Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant.
} Transcript of Record.

Be it remembered, that, heretofore, to-wit: on the 9th day of June, 1903, came the appellant, by counsel, and filed the statement of appeal and transcript of record from the Jefferson county court, which said transcript of record and statement of appeals is in words and figures as follows, to wit:

Jefferson Circuit Court, Chancery Branch, 1st Division.

THE COMMONWEALTH OF KENTUCKY, by WM. L. WELLER, JR., Revenue Agent for Jefferson County, Kentucky, Appellant,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Appellee.
} Statement of Appeal.

3 The above named are all of the parties appellant and appellee. The judgment appealed from will be found on pages

— of the transcript of record in the Jefferson county court, and was rendered by the latter court on the 14th day of May, 1903. The appeal herein was granted by said court, and the same is taken by appellant without bond as provided by section 3, sub-division 1, article 13, chapter 128, *at* the acts passed at the session of the legislature in 1902, being the general revenue act which became a law March 29th, 1902. The clerk will isue summons against appellee directed to the sheriff of Jefferson county.

SAMUEL B. KIRBY,
H. L. STONE,
Attorneys for Appellant.

STATE OF KENTUCKY,
County of Jefferson.

Pleas Before the Honorable James P. Gregory, Judge of the Jefferson County Court, at the Court House, in the City of Louisville, County and State Aforesaid, and on the Dates Hereinafter Mentioned.

4 COMMONWEALTH OF KENTUCKY, ETC., Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant.
} Transcript of Record.

STATE OF KENTUCKY,
Jefferson County.

June County Court.

JUNE 6TH, 1902.

Came W. L. Weller, Jr., revenue agent for Jefferson county, Kentucky, and filed a statement of omitted personal property, of the Union Refrigerator Transit Company, to be listed for assessment for State and county taxes for the years and amounts as follows:

September 15th, 1890	$2,000,000.00
September 15th, 1891	2,000,000.00
September 15th, 1892	2,000,000.00
September 15th, 1893	2,000,000.00
September 15th, 1894	2,000,000.00
September 15th, 1895	2,500,000.00
September 15th, 1896	2,500,000.00
September 15th, 1897	3,000,000.00
September 15th, 1898	3,000,000.00
5 September 15th, 1899	3,000,000.00
September 15th, 1900	4,000,000.00
September 15th, 1901	4,000,000.00

The statement referred to in the foregoing order is as follows:

Jefferson Circuit Court.

THE COMMONWEALTH OF KENTUCKY, by W. L. WELLER, Jr., Revenue — for Jefferson County, Kentucky, Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT CO., Defendant. } Statement.

The plaintiff states that W. L. Weller, Jr., was on the 24th day of July, 1900, duly appointed revenue agent in and for Jefferson county, Kentucky, by the auditor of public accounts for the Commonwealth of Kentucky, and executed bond and duly qualified and is now acting as such revenue agent, and by virtue of his office prosecutes this action in the name of the Commonwealth of Kentucky.

Plaintiff states that the defendant, Union Refrigerator Transit Company, is a corporation created and organized under the
6 laws of this State; that it was organized as aforesaid on the 2nd day of January, 1890, by filing duly executed articles of incorporation with the county court clerk of Jefferson county, Kentucky, and having same recorded under the corporate name and style of "Polar Equipment and Transit Company of Kentucky," with an authorized and paid up capital of $2,000,000.00; that afterwards on the 16th day of May, 1890, by a vote of the stockholders of said corporation its corporate name was changed to "Union Refrigerator Transit Company," all of which appears of record in the county court clerk's office of Jefferson county, Kentucky, of date May 27th, 1890, and that its principal place of business is Jefferson county, Kentucky.

Plaintiff further states that on the 15th day of September, 1890, September 15th, 1891, September 15th, 1892, September 15th, 1893, September 15th, 1894, September 15th, 1895, September 15th, 1896, September 15th, 1897, September 15th, 1898, September 15th, 1899, September 15th, 1900, and September 15th, 1901, and each of said years, the defendant was the owner seized of and in possession of personal property consisting of stock, bonds, notes, mortgages,
7 cash, collaterals, choses in action, leases, grants, privileges and cars, rolling stock, patent rights and divers and sundry other items of personal property, which was subject to and liable to taxation to the Commonwealth of Kentucky, county of Jefferson and city of Louisville for each and all of said years, and plaintiff states and charges that the defendant has knowingly and wilfully refused to assess for taxation either for State, county or municipal purposes, any of the said personal property for either of said years, and still fails and refuses to assess the same, and that all of said personal property is omitted from assessment and taxation.

Plaintiff avers that the fair cash value of the aforesaid personal

property was for the various years as follows: September 15th, 1890, two million dollars; September 15th, 1901, two million dollars; September 15th, 1892, two million dollars; September 15th, 1893, two million dollars; September 15th, 1894, two million dollars; September 15th, 1895, two million, five hundred thousand dollars; September 15th, 1896, two million, five hundred thousand dollars; September 15th, 1897, three million dollars; September 15th, 1898, three million dollars; September 15th, 1899, three million dollars; September 15th, 1900, four million dollars;

8 Wherefore plaintiff prays that the aforesaid personal property belonging to the defendant be assessed for the purpose of taxation to the defendant for State taxes for the Commonwealth of Kentucky, for county taxes for the county *taxes for the county* of Jefferson and for municipal taxes for the city of Louisville, as follows: September 15th, 1890, two million dollars; September 15th, 1891, two million dollars; September 15th, 1892, two million dollars; September 15th, 1893, two million dollars; September 15th, 1894, two million dollars; September 15th, 1895, two million, five hundred thousand dollars; September 15th, 1896, two million, five hundred thousand dollars; September 15th, 1897, three million dollars; September 15th, 1898, three million dollars; September 15th, 1899, three million dollars; September 15th, 1900, four million dollars; and that the defendant being adjudged to pay a penalty of twenty per centum on the aggregate amount of taxes due and to pay the costs of this proceeding and the plaintiff prays for all proper and general relief.

THE COMMONWEALTH OF KENTUCKY,
By W. L. WELLER, JR.,
Revenue Agent for Jefferson County, Kentucky.

9 The following are copies of the summons issued in the above case with return of the sheriff thereon:

The Commonwealth of Kentucky, Jefferson county court, to the sheriff or any constable of Jefferson county, Greeting:

You are hereby commanded to summon Union Refrigerator Transit Company to appear before the Jefferson county court on the first day of its next July term and answer a statement this day filed against it by the Commonwealth of Kentucky by W. L. Weller, Jr., revenue agent in and for Jefferson county, Kentucky, and show cause why it should not be assessed for the years 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900 and 1901, of certain personal property as fully set up and described in the statement filed, and warn it upon its failure to answer said statement, the allegations of the same will be taken for confessed as true against it and judgment will be rendered thereon according to law.

Given under my hand as clerk of the Jefferson county court this 6th day of June, 1902.

W. J. SEMONIN, C. J. C. C.,
By JOS. J. SCHENE, D. C.

On reverse side of above:
Came to hand June 6th, 1902, at 2:45 p. m.
Executed by delivering a true copy of the within summons, one copy to Fred Forcht, Jr., and one copy to Wm. H. Field, resident agents and attorneys of the defendant, Union Refrigerator Transit Company, this 6th day of June, 1902.

E. T. SCHMITT, S. J. C.

The Commonwealth of Kentucky, Jefferson county, to the sheriff or any constable of Jefferson county, Greeting:

You are hereby commanded to summon Union Refrigerator Transit Company to appear before the Jefferson county court on the first day of its next July term and answer a statement this day filed against it by the Commonwealth of Kentucky, by W. L. Weller, Jr., revenue agent in and for Jefferson county, Kentucky, and show cause why it should not be assessed for the years 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900 and 1901, of certain personal property and real estate as fully set up and described in the statement filed, and warn it upon its failure to answer
11 said statement, the allegations of the same will be taken for confessed as true against it and judgment will be rendered thereon according to law.

Given under my hand as clerk of the Jefferson county court, this 7th day of June, 1902.

W. J. SEMONIN, C. J. C. C.,
By JOS. J. SCHENE, D. C.

On reverse side of above:
Came to hand June 7th, 1902, at 10:30 a. m.
Executed June 9th, 1902, on Union Refrigerator Transit Company be delivering a copy of the within summons to Anselan Buchanon, agent of said company, he being chief officer found in this county at this time.

E. T. SCHMITT, E. T. S.

STATE OF KENTUCKY,
Jefferson County.

July County Court.

JULY 7TH, 1902.

COMMONWEALTH OF KENTUCKY
vs.
UNION REFRIGERATOR TRANSIT COMPANY, F. H. GOODRIDGE, Ex'or of J. C. Bourne, Dec'd; C. A. Rogers, The Mutual Life Insurance Co. of Kentucky, David Davis.

12 Came parties and by consent it is ordered by the court that the foregoing cases are postponed until first Monday in September, 1902, for hearing.

And at a county court continued and held for the court aforesaid on the 2nd day of September, 1902, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, ETC.,
vs.
UNION REFRIGERATOR COMPANY, THE MUTUAL LIFE INSURANCE Company of Kentucky, C. A. Rogers.

On motion of defendants it is ordered by the court that the foregoing actions be and are passed until the first day of next October term.

And at a county court continued and held for the court aforesaid on the 6th day of October, 1902, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, ETC.,
vs.
UNION REFRIGERATOR COMPANY, THE MUTUAL LIFE INSURANCE Company of Kentucky, C. A. Rogers.

13 On motion of plaintiff, by county attorney, Kirby, it is ordered by the court that the foregoing actions be and are passed until the first day of the next term.

And at a county court continued and held for the court aforesaid on the 3rd day of November, 1902, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, ETC.,
vs.
UNION REFRIGERATOR COMPANY.

By consent it is ordered by the court that the within action be and s continued until the first day of next term.

And at a county court continued and held for the court aforesaid on the 5th day of January, 1903, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, ETC.,
vs.
UNION REFRIGERATOR TRANSIT COMPANY.

Came plaintiff, by counsel, H. L. Stone, and defendant by its counsel, and defendant filed its answer herein; thereupon by consent of counsel, it is ordered by the court that the hearing herein be and is assigned to the 20th inst.

14 The answer referred to in the above order is as follows, to-wit:

Jefferson County Court.

THE COMMONWEALTH OF KENTUCKY, by W. L. WELLER, JR., Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant.
} Answer.

1. For answer herein, the defendant denies that on September 15th, 1890, September 15th, 1891, September 15th, 1892, September 15th, 1893, September 15th, 1894, September 15th, 1895, September 15th, 1896, September 15th, 1897, September 15th, 1898, September 15th, 1899, September 15th, 1900, or September 15th, 1901, or each of said years, or any of them, the defendant was the owner, seized of or in possession of personal property consisting of stocks, bonds, notes, mortgages, cash, collateral, choses in action, leases, grants, privileges and cars, rolling stock, patent rights and divers and sundry and other items of personal property which were subject to and liable to taxation to the Commonwealth of Kentucky, county

15 of Jefferson, and city of Louisville, or any of them, for each and all of said years, or any of said years; denies that the defendant has knowingly and wilfully, or at all, refused to assess for taxation, either for State, county or municipal purposes any of its personal property for either or any of said years; denies that it still fails and refuses to assess the same; denies that all of said personal property or any personal property of the defendant is omitted from assessments and taxation. The defendant denies that it was the owner at the time mentioned in the statement of any property, real or personal, except as hereinafter set forth.

Defendant denies that the fair cash value of the aforesaid personal property or of any property belonging to this defendant was for the various years as follows: September 15th, 1890, two million dollars; September 15th, 1891, two million dollars; September 15th, 1892, two million dollars; September 15th, 1893, two million dollars; September 15th, 1894, two million dollars; September 15th, 1895, two million, five hundred thousand dollars; September 15th, 1896,

two million, five hundred thousand dollars; September 15th, 1897, three million dollars; September 15th, 1896, three million
16 dollars; September 15th, 1899, three million dollars; September 15th, 1900, four million dollars.

2. For further answer herein the defendant says its liability, if any there is, to assessment of its personal property for taxation is a liability created by statute; that this proceeding was instituted on June 5th, 1902; that defendant's liability, if any, to assessment is confined to the five years next preceding said June the 5th, 1902; that its liability, if any there is or was, as to all matters prior to June 5th, 1897, is barred; and defendant pleads and relies upon the statute of limitation in bar of all matters prior to June 5th, 1897.

3. Further answering herein, the defendant says that article 3, sub-division 1, of the Kentucky Statutes, provides for certain reports to be made by certain corporations to the auditor of the State; that upon the facts stated in said report, together with any other information obtainable, the board of valuation and assessment assessed the value of the franchise of said corporation as the basis for a franchise tax; that in case of a corporation organized and incorporated under the laws of this State, but operating and conducting
17 business in other States as well as this State, the value of the franchise of said corporation is found as follows: Said board shall fix the value of the capital stock and shall determine from the amount of the gross receipts of said corporation in this State and elsewhere the proportion which the gross receipts in this State, within the twelve months next preceding the 15th day of September of the year in which the assessment is made, bear to the entire gross receipts of the company, and the same proportion of the value of the entire capital stock less the assessed value of the tangible property assessed or liable to assessment in this State shall be the correct value of the corporate franchise of said corporation for taxation in this State.

By section 4083 of the articles and sub-division above mentioned of the Kentucky Statutes, it is provided that said board shall notify all corporations affected of the fact that the franchise has been valued for taxation, that such corporations shall have thirty days from the receipt of such notice within which to ask a change of valuation, and that the action of the board upon such application shall be made final.

18 Defendant says that in each of the years 1893, 1894, 1895, 1896, 1897, 1898, 1899 and 1900, in compliance with said provisions, it filed with the auditor of the State of Kentucky the report as provided for and required to be filed; that in each of said years the board of valuation and assessment fixed the value of the defendant's entire capital stock and in determining the proportion which the gross receipts of the defendant in this State bore to the gross receipts of — in this State and elsewhere declared the same proportion of the entire capital stock to be the value of the franchise

of defendant for taxation in this State. Said board made no deduction whatever on account of the tangible property of the defendant. In each of said years defendant paid the tax levied by the State upon its franchise without any deductions having been made on account of its tangible property, the judgment of said board being that there was no tangible property of defendant subject to assessment.

Defendant says that in each of said years in the proceedings by and before said board of valuation and assessment, there was necessarily involved the question as to whether or not the defendant had within this State tangible property subject to assessment and
19 taxation; that the same question is involved here; that in the said proceedings before said board in each of said years, the parties were the same as the parties to this proceeding; that said board of valuation and assessment at all of the times mentioned was a tribunal having jurisdiction of the subject matter and of the parties; that the judgment of said board for each of said years has been complied with by this defendant and none of said judgments was ever questioned or appealed from by the plaintiff within the time allowed by the statute; and defendant pleads that the matters set forth in plaintiff's statement are *res adjudicata*, and plaintiff is estopped to now prosecute them.

And defendant says further that any taxes for which defendant may have been liable on account of any tangible property it may have had subject to assessment and taxation in each of said years has been paid; that said board of valuation in each of said years in fixing the value of defendant's franchise did not deduct the value of defendant's tangible property, if any there was, and the value of said franchise in each of said years as fixed by said board included the value of any tangible property which defendant may have had, if any, in said years, respectively, subject to assessment and taxation.

20 4. Answering further, defendant says it is a corporation organized and existing under the laws of the Commonwealth of Kentucky; that its principal office is at Crescent Hill, Jefferson county, Kentucky; that prior to ——, 1902, its principal office was in Louisville, Ky.; that at all the times mentioned in the statement herein, its real place of business was at St. Louis, Missouri; that at no time has it had, nor has it now, any property of any character or description within this county of Jefferson or State of Kentucky other than the cars as hereinafter shown.

The defendant says that it is, and was at all the times mentioned in the statement herein, the owner of certain refrigerators and certain box-cars—made personalty by section 212 of the constitution of Kentucky—and that its business consisted and consists in leasing said cars to whomsoever desire them; that at none of the times mentioned were any of said cars located within this county or State, nor except as hereinafter shown, were any of said cars within said county or State; that such cars as are hereinafter shown to have

been within said county or State were not assigned or located here, but were merely passing through; that said cars constituted at all the times mentioned in the statement and now constitute all the property of defendant.

21 Defendant says that in the respective years mentioned in the statement it was the owner of the following cars:

1890	129 cars	1896	2000 cars
1891	957 cars	1897	2000 cars
1892	1762 cars	1898	2000 cars
1893	2000 cars	1899	2000 cars
1894	2000 cars	1900	2000 cars
1895	2000 cars		

The defendant states that it kept no record of and has no means of knowing certainly and exactly how many of said cars were within this county or State at any given time; but it states that by dividing the gross earnings of defendant in the State of Kentucky in each year by the gross earnings per car in each year, the average number of said cars within the State of Kentucky in each year is found. The defendant says that its gross earnings in Kentucky, the average gross earnings per car, and the average number of its cars within this State for each of the years mentioned in the statement herein were as follows:

22

Year.	Gross earnings in Kentucky.	Earnings per car.	Average number of cars within this State.
1890	$137.11	$185.77	Less than 1
1891	1987.89	200.30	10 cars
1892	4000.34	167.39	24 cars
1893	3873.82	149.47	26 cars
1894	3619.28	149.98	24 cars
1895	2780.94	131.26	21 cars
1896	4702.32	150.95	31 cars
1897	4511.60	163.90	28 cars
1898	4676.24	161.22	29 cars
1899	6063.50	157.78	40 cars
1900	11048.67	164.57	67 cars

The defendant says that none of said cars was new, and that their average value throughout the period covered by the statement herein filed was between $150.00 and $200.00.

The defendant says that all of said cars were at all the times mentioned actually located within other States and were assigned in the Northwestern States; that a small portion of its business was and is done in Kentucky; that its cars are taxable wherever found, and it pays taxes upon them in various other States, and has

23 never escaped or sought to escape taxation elsewhere upon the ground that it was and is a corporation organized and

existing under the laws of Kentucky. And defendant says that only so much of its property as was actually within this State in each of the years mentioned in the statement and was protected by the laws of this State, was and is liable to assessment and taxation by this State and county. Defendant's cars being movable, tangible personalty which have acquired an actual situs elsewhere, are not liable for assessment and taxation at the domicile of the owner; and that to hold otherwise would result in a violation of section 13 of the constitution of Kentucky, which prohibits the taking of private property for public use without just compensation.

5. Further answering, the defendant says that the assessment of property, in the years 1890, 1891 and 1892, was made pursuant to the provisions of the act of the General Assembly of Kentucky, approved May 17th, 1886, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," and comprising chapter 92, of the General Statutes; that by article 1, section 3, of said act and chapter, it was provided that:

"All property, real and personal, within this State, not
24 herein expressly exempt by law, shall be assessed as nearly as practicable, according to uniform rate, in the manner hereinafter provided."

Defendant says that in the year 1890, 1891 and 1892, it owned no real property within this State or elsewhere; that it was the owner of certain refrigerator and box cars; that the number of said cars of which it was the owner in said years was as follows: 1890, 129 cars; 1891, 957 cars; 1892, 1762 cars; defendant says that its business in said years consisted in leasing said cars to whomsoever desired them; that in said years all of said cars were located and assigned elsewhere and that none of said cars was within this State; that during said years divers of its cars passed through this State, but none of them had a situs here. Defendant kept no record of and has no means of ascertaining certainly or exactly how many of said cars came within this State in said years. But it states that by dividing the gross earnings of defendant in the State of Kentucky by the gross earnings per car, the average number of cars within this State each year is found. Defendant's gross earnings in this State, the gross earnings per car, and the average number of cars within the State in each of said years, follows:

25 Gross earnings per year in Kentucky.		Earnings per car.	Average number of cars within this State.
1890.....	$137.11	$185.77	Less than 1
1891.....	1987.89	200.30	10 cars
1892.....	4000.34	167.39	24 cars

Defendant says that none of said cars was new, and that their average value throughout said years was between $150.00 and $200.00.

6. For further answer herein, the defendant says that section 4020

of the Kentucky Statutes is unconstitutional and void in so far as it seeks to subject to assessment and taxation personal property of residents of this State which is "out of this State."

1. Because it is in conflict with section 171 of the constitution of Kentucky, which provides as follows:

"They (taxes) shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax."

2. Because it is in conflict with section 1 14th amendment of the United States, which provides:

"No State * * * shall deny to any person within its jurisdiction *and* equal protection of the laws."

26 7. Further answering, defendant says that so much of section 4241 of the Kentucky Statutes, upon which this proceeding is based, as provides that all persons whose property may be assessed therein, shall in addition to the taxes, pay a penalty of twenty per centum on the amount of the taxes due, except where such property shall have been duly listed by the owner thereof, is unconstitutional and void, because in conflict with section 11 of the constitution of Kentucky and section 1 of the 14th amendment to the Constitution of the United States, in that it denies the defendant due process of law.

8. Further answering, defendant says that it was not called up by the county assessor or by his deputy nor by any one authorized to do so, nor by any one as provided by section 4065 of the Kentucky Statutes, in any of the years named in the statement herein, to list its property with the county assessor for assessment and taxation; and defendant says that it is not liable, even though its property be adjudged liable to assessment, for the penalty provided in section 4241 of the Kentucky Statutes.

9. Defendant further says that section 2515 of the Kentucky Statutes provides that an action for a penalty or forfeiture
27 when no time is fixed by the statutes or law prescribing the same, shall be commenced within five years next after the cause of action accrued; that plaintiff's right to institute this proceeding, if any he has, accrued on or about February 10th of each of the years 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902; that this proceeding was instituted on June 5th, 1902; and defendant pleads and relies upon the statute, and says that all matters prior to June 5th, 1897, are barred.

10. The defendant further says that section 4020 of the Kentucky Statutes is unconstitutional and void in so far as it seeks to subject to assessment and taxation personal property of corporations organized and existing under the laws of this State which property is located outside of this State, because it is to that extent in conflict with section 1, 14th amendment to the Constitution of the United States.

Defendant says that by section 4096 of the Kentucky Statutes, covering the assessment of railroad property, it is provided that the president or chief officer of such railroad companies as own or

operate railroads outside of the State shall be required to list for assessment only such portion of the entire value of its rolling stock as the number of miles of its railroad in the State bears to the whole number of miles operated by such company in or out of this State.

28 Defendant says that by section 4020 of the Kentucky Statutes, it is denied *that* the protection of the law which is afforded to railroad companies by section 4096.

11. Further answering, defendant says that the authority and duties of the judge of the county court relative to the assessment of omitted property are prescribed by section 4241 of the Kentucky Statutes, which is part of an act of the General Assembly of Kentucky, approved March 15th, 1894, and entitled "An act to amend an act entitled 'An act relating to revenue and taxation;'" that by said section and act the judge of the county court is authorized, if he shall decide the property of defendant liable to assessment, "to fix the value thereof, at its fair cash value, estimated as required by law;" that section 4053 of the Kentucky Statutes being part of the act of the General Assembly of Kentucky, approved November 11th, 1892, entitled, ——, provides that property shall be assessed for taxation for its fair cash value, estimated at the price it would bring at a fair voluntary sale."

Defendant further says that prior to March 15th, 1894, when the act embodied in section 4241 of the Kentucky Statutes was approved, and in the years 1890, 1891, 1892 and 1893, there was in full

29 force and effect an act of the General Assembly approved April 29th, 1880, entitled "An act authorizing the auditor to appoint agents to attend to revenue matters," embodied in chapter 93 of the General Statutes of Kentucky; that by the second section thereof the agent of the auditor was authorized, where any person had failed to give in a list or a proper list of his property, to give information of same to the county court or the county where such lists should have been given; that upon hearing that the court was satisfied of the failure to list, it should fix and assess the value thereof, with interest at ten per cent. per annum.

Defendant further says that by chapter 92, article VI, section 18, of the General Statutes, being part of an act of the General Assembly of Kentucky approved May 17th, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," which was in full force and effect in and during the years 1890, 1891 and 1892, and until November 11th, 1892, it was provided that in assessing property for taxation the assessor should, from his own knowledge, from statements from persons listing the property, and from such other evidence as he might be able to obtain, "fix a full and fair value" upon said property. Defendant says that in the years 1890, 1891 and 1892, and until November 11th, 1892, a method of

30 fixing assessments prevailed different from which was afterwards and is now provided for by section 4241 and 4053 of the Kentucky Statutes; that as section 4241 only authorizes the judge

of the county court to value the property, if liable, according to the existing law, which became effective November 11th, 1892, he cannot for the years 1890, 1891 or 1892, assess defendant's property either according to the existing law, or according to the law in force in said years.

12. Further answering, the defendant says that section 2515 of the Kentucky Statutes provides that an action for a penalty or forfeiture when no time is fixed by the statute or law prescribing the same, shall be commenced within five years next after the cause of action accrued; that section 4241 which prescribed a penalty of twenty per cent. to be paid by those whose property is assessed thereunder, does not fix any limitation upon the right to recover said penalty; that this action was filed on June 5th, 1902, that the right of plaintiff to maintain this action is limited to the five years next preceding June 5th, 1902, and that all matters prior to June 5th, 1897, are barred; and the defendant pleads and relies upon the statute.

31 13. Further answering, the defendant says that, even should the court hold its property, or any of it, liable to assessment in this State and county, it is not liable for the penalty provided for by section 4241, nor for the costs of this proceeding, because defendant was never in any of the years mentioned in the statement, called upon by the assessor or his deputy to list its property for assessment and taxation.

14. For further answer, the defendant says that so much of section 4241 of the Kentucky Statutes as provides that persons whose property is assessed thereunder shall pay in addition to the taxes imposed, a penalty of twenty per cent. upon the amount of the tax is unconstitutional and void because it is in conflict with section- 11 and 171 of the constitution of Kentucky and also with section 1 of the 14th amendment to the Constitution of the United States.

15. Further answering herein, the defendant says that in February, 1901, the county board of supervisors duly assessed the property of this defendant as of September 15th, 1900, for taxation in this State and county; that thereafter defendant complained of said assessment in the manner provided by law, and after a full

32 hearing of said complaint, said board, on February 14th, 1901, duly set aside its former order making the assessment and decided that the property of defendant was not liable for asessment and taxation in this State and county. Defendant says that this matter, as to the year 1901, is *res adjudicata*; that said proceeding before said board was between the same parties here involved, that it concerned the same property, and that said judgment of the board has never been appealed from or set aside, and is in full force and effect.

Wherefore, having answered the defendant prays that the statement herein be dismissed.

HUMPHREY, BURNETT & HUMPHREY,
FORCHT AND FIELDS,
Attorney- for Defendant.

And at a county court continued and held for the court aforesaid on the 20th day of January, 1903, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, ETC.,
vs.
UNION REFRIGERATOR TRANSIT COMPANY.

33 Came parties by their respective counsel, and plaintiff filed demurrer herein; thereupon by consent, the same was assigned to the 24th instant for hearing.

The demurrer mentioned in the foregoing order is as follows:

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by W. L. WELLER, JR., Revenue Agent for Jefferson County, Kentucky,
vs.
UNION REFRIGERATOR TRANSIT COMPANY.

The plaintiff demurs to paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15, of the defendant's answer herein, because neither of said paragraphs states facts sufficient to constitute or support a defense to plaintiff's causes of action or either of them.

SAMUEL B. KIRBY,
H. L. STONE,
Attorneys for Plaintiff.

And at a county court continued and held for the court aforesaid on the 24th day of January, 1903, the following order was entered of record, to-wit:

34 COMMONWEALTH OF KENTUCKY, by, etc.,
vs.
UNION REFRIGERATOR TRANSIT COMPANY.

By consent of counsel it is ordered by the court that the hearing of the demurrer heretofore filed herein, be and is continued until the 30th inst.

And at a county court continued and held for the court aforesaid on the 27th day of January, 1903, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, by, etc.,
vs.
UNION REFRIGERATOR TRANSIT COMPANY.

By consent of counsel it is ordered by the court that the hearing of the demurrer heretofore filed herein, be and is assigned until the 31st inst.

And at a county court continued and held for the court aforesaid on the 31st day of January, 1903, the following order was entered of record, to-wit:

35 COMMONWEALTH OF KENTUCKY, by, etc.,
vs.
UNION REFRIGERATOR TRANSIT COMPANY.

The demurrer of plaintiff filed herein coming on for hearing, came parties by their respective counsel, and plaintiff, by counsel, filed supplemental answer, and defendant by counsel filed demurrer to said amended answer; thereupon counsel announced ready, and the argument of counsel having been heard, and the court not being sufficiently advised, takes time.

The supplemental answer referred to in the foregoing order is as follows:

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by W. L. Weller, etc., Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant.
} Supplemental Answer.

Paragraph 16. The defendant, as supplemental to its original answer herein, and by leave of court, states that: The
36 laws of the Commonwealth of Kentucky, provides that companies of a like character with the defendant, whose personal property lies partly within the State of —— and partly within other States, shall be assessed by and in the State of Kentucky only upon such proportion of its property as its miles of line within the State of Kentucky bear to the total miles of line with- the State of Kentucky and elsewhere; or, such proportion as its gross earnings within the State of Kentucky bear to the total gross earning- within the State of Kentucky and elsewhere; that this is a construction placed upon said laws by the officials of the State of Kentucky in the assessment of the personal property of corporations of like character with this defendant: and that to assess this defendant upon all its personal property situated not only within the State of Kentucky but elsewhere and without this State, will be a violation of the equal protection of the laws granted by the 14th amendment to the Constitution of the United States.

Wherefore, the defendant prays as in its original answer.

FORCHT & FIELD,
HUMPHREY, BURNETT & HUMPHREY,
Attorneys for Defendant.

37 The demurrer to said amended answer referred to in the foregoing order is as follows:

Jefferson County Court.

COM'TH, ETC., Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant. } Demurrer.

The plaintiff demurs to the amended answer being paragraph 16 because the same does not state facts sufficient to support or constitute a defense to plaintiff's causes of action or either of them.

SAMUEL B. KIRBY,
County Attorney.
H. L. STONE,
Attorney for Plaintiff.

And at a county court continued and held for the court aforesaid on the 23rd day of March, 1903, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, by W. L. WELLER, JR., Revenue Agent for Jefferson County, Ky., Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant

The court having had under consideration the demurrer of
38 the plaintiff to certain paragraphs of the defendant's answer and supplemental answer filed herein, this day filed its written opinion herein on said demurrer, which is made part of the record, and in pursuance of said opinion, it is now adjudged by the court that said demurrer be sustained to paragraphs 2, 3, 7, 8, 11, 13, 14 and 15 of defendant's answer; to which the defendant excepts and said demurrer is overruled to paragraphs 4, 5, 6, 9, 10, 12 and 16 of said answer (the latter paragraph consisting of a supplemental answer of the defendant filed herein February 7th, 1903), to which the plaintiff excepts. Thereupon the plaintiff filed its reply to the paragraphs of defendant's answer to which said demurrer was overruled and on motion of the plaintiff this action is now passed until Monday, April 6th, 1903, being the first day of the next regular term of this court.

The opinion referred to in the foregoing order is as follows, to-wit:

39 Jefferson County Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE UNION REFRIGERATOR TRANSIT COMPANY, Defendant. } Opinion.

The discussion of the various points raised by demurrer to the different paragraphs of the answer may, for convenience, be considered under two general heads.

The court will first consider the various defenses involving other than the main question as to the power and purpose of the legislature of Kentucky to tax personalty of its citizens, not within the State and having a taxable situs elsewhere.

I.

(*a.*) The second paragraph of the answer is a plea of limitation as to all taxes assessable prior to June 5th, 1897, that being five years preceding the institution of this suit. The decision of the court of appeals in the recent case of the Louisville and Jeffersonville Bridge Company *v.* Commonwealth, 24th Ky. L. R., 1339, seems to
40 conclusively determine this question against the defendant, and the demurrer to that paragraph must consequently be sustained.

(*b.*) The third paragraph pleads the action of the State board of valuation and assessment in assessing defendant's franchise and failing to deduct, as provided by statute and value of its tangible property, as an adjudication to the effect that the defendant had no such property, subject to taxation in Kentucky. It would be somewhat extraordinary to accord to a mere negative act, or omission of such a board, the finality which attaches to the finding of a judicial tribunal. The court does not consider the authority of Cassidy, etc. *v.* Young, 92 Ky., 227, and Louisville Water Company *v.* Clark, sheriff, wherein the judicial and ministerial acts of the county judge are discussed, as in any way supporting the contention of defendant in this paragraph. The State board of valuation and assessment has no judicial power whatever and absolutely no power to assess, or determine whether or not defendant's tangible property is subject to assessment. It does not appear whether said board failed to deduct the value of tangible property by reason of clerical error, mistake, ignorance, or what not. It was for the officers authorized to make the assessment, and for them alone, to say whether or not
41 defendant had tangible property subject to taxation. The demurrer to the third paragraph of the answer must be sustained.

(*c.*) Several defenses are claimed to be sustained by the seventh paragraph of the answer.

(1.) It is claimed that sec. 4241 Ky. St., in imposing a penalty of twenty per cent. upon the amount of taxes assessed thereunder, violates section 11 of the constitution of Kentucky and section 1 of the 14th amendment to the Federal Constitution. Under section 4064 Ky. Stats. it is made the duty of the property owner to give in a list of his taxable property when the same has not been assessed by the assessor. For failure to discharge this duty, the State has the undoubted right, and it is clearly its duty, to impose a penalty. Section 4241 prescribes the penalty, but it does not, as contended by defendant's counsel, undertake to enforce this penalty without a trial, as in the case of Marshall *v.* McDaniel, 12th Bush., 378, or

without right of trial by jury, as in case of Doran and Ryan *v.* Commonwealth, 1st Dana, 332.

Under section 4241 the question of whether or not the penalty has been incurred is left open for any defense that defendant may see fit to interpose, and indeed, this section itself suggests at
42 least one defense, to-wit, that "such property shall have been duly listed by the owner thereof." The court perceives no reason why this question may not be determined by due process of law in this proceeding and with the instruction of the jury.

Similar penalties have been frequently upheld by decisions of the court of appeals.

See

Louisville City Railway Company *v.* City, 4 Bush., 482;
L. & N. R. R. Co. *v.* Commonwealth, 17th Ky. L. R., 136;
Central R. & B. Co. *v.* Commonwealth, 20 Ky. L. R., 1891;
Walston *v.* City, 23 Ky. L. R., 1852;
Boyd *v.* Randolph, 91 Ky., 472.

(2.) It is further argued as a defense, under this paragraph, that inasmuch as the penalty in such cases goes to the auditor's agent, it is a levy for other than a public purpose, and therefore a violation of sec. 171 constitution of Kentucky. One of the public purposes for which taxes are collected is the payment of public officers, for services rendered the public. The auditor's agent is a public officer. He performs an important public service in discovering omitted property and in compelling it to contribute its proportion toward the support of the government. The court is unable to see upon what principle the twenty per cent. paid him is any less an
43 appropriation to a public use or purposes than the four per cent. paid to the sheriff, under sections 1729 and 4148, upon taxes collected in the usual course.

The contention, that defendant cannot be required to pay a penalty because it was not called upon to list its property, is effectively disposed of by section 4064, which makes it the duty of the property owner to list same, even if not called upon. The demurrer to the seventh paragraph of the answer is therefore sustained.

(*d.*) The failure of the assessor to call upon the defendant as provided in section 4065, does not absolve it from the duty imposed by section 4064, and such call by the assessor is not made a condition precedent to the imposition of penalties of section 4241, but a preparatory step to invoking other remedies by the board of supervisors. Demurrer to the eighth paragraph sustained.

(*e.*) Paragraph nine pleads section 2515 Kentucky Statutes in bar of all penalties prior to June 5th, 1897. These penalties are imposed only in cases of failure on the part of tax-payer to list his property. The latest date at which he can voluntarily list
44 his property is the date of adjournment of the board of tax supervisors. This date in no case could be beyond the latter part of February of the year for which the tax was levied, Ken-

tucky Statutes, 4119, 4121 and 4123. To the extent that a penalty is sought to be enforced, this is "an action for a penalty of forfeiture," and "no time is fixed by the statute or law prescribing the same." The auditor's agent might each year immediately after the adjournment of the board of supervisors have instituted an action of this kind. The cause of action for a penalty under section 4241 for failure to discharge the duty enjoined by section 4064 thereupon arose and was complete. This action is not subject to the same rules of limitation which are applicable to the assessment itself, or the action to coerce payment thereon of the principal debt. Demurrer to the ninth paragraph must be overruled.

(*f.*) It is perfectly clear that the act of November 11th, 1892, which is the present revenue law, is not retrospective in its operation and does not govern assessment for years 1890, 1891 and 1892, but it is equally clear that it does repeal the prior act governing omitted assessments, so far as those and prior years were concerned.
45 This is clearly settled by the case of Long *v.* City of Louisville, 97th Ky., 364. The court is further of the opinion that no substantial difference exists either as to the manner of standard of assessment under the two laws. Of course, assessments for 1890, and '1 and '2, will have to be made in manner and according to requirements of law then in force. Demurrer to eleventh paragraph sustained.

(*g.*) Paragraph twelve is a repitition of paragraph nine, and while it seems to be surplusage, the demurrer thereto must be overruled, for reasons stated *supra.*

(*h.*) Section 4064, as above stated, makes it defendant's duty to list its property; for violation of this duty it is liable for penalties prescribed by section 4241, including costs of this proceedure. Demurrer to paragraph thirteen sustained.

(*i.*) Demurrer to fourteenth paragraph must be sustained for reasons stated *supra* in decision of demurrer to paragraph seven.

(*j.*) The plea of *res judicata*, based upon the action of the board of supervisors in first assessing and then setting aside assessment of defendant's property for the year 1901, is not considered good.
46 The board was a ministerial body vested with no judicial power, with no authority to exempt property, but charged with the sole duty of revaluing it, and listing such property as had been omitted. The effect of this action was not to assess the property. If, as the petition charges, the defendant owned property as of September 15th, 1900, it was omitted, and therefore assessable as any other omitted property. The decision in case of Coulter *v.* Louisville Bridge Company, 24 Ky. L. R., as this court understands it, in no sense holds to the contrary. This view of the law is sustained by decision in case of City of Middlesboro *v.* New South Brewing Company, 21 Ky. L. R. 1782. Demurrer to paragraph 15 sustained.

II.

The main question upon the submission is, the determination of the effect to be given section 4020 Kentucky Statutes, and to what extent, if at all, it violates the provisions of either the State or Federal Constitution. Able and elaborate briefs citing numerous authorities have been submitted upon both sides, but no case precisely applicable is cited on either side, though many of the cases furnish helpful sidelights.

47 The avowed and unchanging purpose of tax legislation, throughout the ages, has been, and still is, the attainment of equality and justice in the distribution of the burden of maintaining government, and while this has assuredly not been fully attained, gratifying progress has attended the long, earnest and sincere struggle, and a reasonably fair approximation has been reached. The achievement of this purpose involves no less avoidance of taxing one piece or class of property too high, than of taxing another piece or class too low, of avoiding double taxation on the one hand, and failure to tax at all, upon the other.

Certain it is that the best thought of our last constitutional convention addressed itself to this task with an earnestness and sincerity of purpose to give to the people of Kentucky the most just and equitable system of taxation within its power, that admits of no sort of doubt.

Much that is contended for on both sides of this case is undoubtedly established by authority beyond question. That moveable personalty, such as cars of refrigerator, palace and chair cars, can, and do, acquire a taxable situs in other States, than those of their owners' residence, is settled conclusively by cases of

48 Pullman *v.* Penn., 141 U. S., 22, Am. Refrig. Transit Co. *v.* Colorado, 174 U. S., 170, Union Refrig. Transit Co. *v.* Utah, 177 U. S., 149, and numerous other cases. There is eminent, though not so sound or satisfactory, authority for the contention that any State in the exercise of its sovereignty may tax all personalty of its citizens of whatever nature, wherever situated, and without regard to whether or not it has a taxable situs, or pays taxes elsewhere. Judson on Taxation, secs. 421, 422 and 423, and authorities there cited.

Here, we are to consider not only the power of the State to levy such tax, but also to require whether or not such is its purpose, and if such purpose is evidenced by its statutes, whether or not it is in any way restrained by its constitution.

A literal interpretation of section 4020 unquestionably sustains plaintiff's contention, but such a construction is so abhorrent to principles of justice and equality, so inconsistent, and so far at variance with what this court conceives to be the cardinal aim and purpose of the fundamental laws of the State, that it is extremely slow to accept such a view as correct. When we consider that our

49 legislature exercises its power to tax moveable personalty of non-residents, to the extent that it has acquired a taxable

situs in Kentucky, and we attribute to it a purpose to be fair and just, we cannot possibly reconcile such action with an intention to tax moveable personalty of residents of this State which is not protected by the law of this State, is in no sense a burden to this State, which is protected by laws of other States, and pays taxes to such States.

The doctrine of "*mobilia personam sequuntur*" offers absolutely no justification for such a levy. The Supreme Court of the United States has repeatedly declared that doctrine antiquated and inapplicable to such a state of case. Union Refrig. Transit Company *v.* Utah, 177 U. S., 149, Commonwealth of Kentucky *v.* Louisville and Jeffersonville Bridge Company, decided February 23rd, 1903, and 184 U. S.

To attribute consistency and common fairness to the legislature, this section should be interpreted to include all personalty of a resident of Kentucky, wherever situated, to the extent it had not acquired (what under the laws of Kentucky applicable to personalty of non-residents, would be), a taxable situs elsewhere. The taxpayer was not to be allowed to escape taxation on personalty
50 properly taxable here, on the ground that on the 15th of September, it was out of the State, and at the same time, escaped taxation in the State where it was then located on the ground that he was a resident of Kentucky, and that his personalty was protected by the law of Kentucky, and not taxable elsewhere.

As the State will not tolerate such a subterfuge, and such inconsistency on the part of a tax-payer, it ought not — be expected to be guilty of just as gross an inconsistency, by taxing the personalty of a non-resident, because it has no actual situs here, and at the same time, refuse to credit the personalty assessment of a resident, by the value of that portion of it, which has a taxable situs, and upon which he pays taxes elsewhere.

If the State be wilfully guilty of such gross injustice and inexcusable inconsistency, its attitude is worse than that of the "bandit with a pistol at the throat of every property owner," so scathingly denounced by the supreme court of Pennsylvania in Commonwealth *v.* D. L. & W. R. R. Co., 145 Pa. St., 96. Such a system is indefensible in morals, and, if put into effective operation, would, as stated by the supreme court of Pennsylvania in the case just cited,
51 result in confiscation of the class of property now in question. The court does not assert the foregoing views as the correct interpretation of the statute, for, concerning that, it has grave doubt, but suggests them as some of the reasons why we should be slow to accept the literal interpretation, contended for by counsel for plaintiff.

The court is of opinion, that the merits of this branch of the controversy are effectively disposed of by the provisions of both the State and Federal constitutions, so that the correct interpretation of section 4020 is not material in disposing of this case.

While the court cannot accept the construction of section 171 of

the Kentucky constitution, which limits the power to tax to property actually within the territorial limits of the power levying the tax, and while it is entirely clear that the property may be "subject to taxation" within such territorial limits without being actually therein, the court recognizes as the cardinal principle, enunciated by that section, an imperative edict for the establishment and maintenance of uniformity and equality in each branch of the State and local government, in the distribution of the burden of taxation.

This limitation upon the taxing power not only denies the
52 right to fix different rates for different pieces or classes of property, but just as effectively and emphatically prohibited a different basis of valuation for one, than that employed for the other, or the taxation of one in whole and the other in part. A uniform tax rate does not secure uniformity of taxation, where one class of property pays upon a valuation equal to 100% of its actual value and another class upon fifty per cent. of such valuation, or when one class of individuals is assessed for all and another for half of its property. A tax rate of fifty cents upon the one and twenty-five cents upon the other, would secure precisely the same degree of uniformity, and would be equally defensible. To tax the entire rolling stock of the defendant under section 4020, notwithstanding only a small portion of it has an actual situs in Kentucky, and to tax similar property with precisely the same situs used in the same way and for the same purpose according to the mileage rule under section 4096, merely because it is the property of a railroad, does violence to every idea or sentiment of uniformity, equality and justice. Such a policy, if carried out on a broad scale, would breed anarchy and incite revolution.

53 Section 182 of the constitution and the interpretation placed upon it by the Supreme Court in the Kentucky railroad cases, 115 U. S., 321, as this court understands them, do not in any sense justify such gross inequality. Section 182 recognizing the peculiar difficulties to be incurred in arriving at the value of railroads and railroad property, and in the collection of taxes distributed over so much territory and throughout so many local taxing districts, relaxed the rule of uniformity as to the manner or method of assessment and collection of taxes, and no further. It cannot, for an instant, be contended that it authorized a different rate or a different standard of valuation, and with no more force can it be contended that the property of a railroad was to be exempt from taxation, where the property of an individual or other corporation of a similar nature and similarly situated was to be taxed.

The contention of counsel for plaintiff would justify the imposition of taxes upon every particle of defendant's rolling stock, if on the 15th of September it should become the owner of all the rolling stock of the Louisville and Nashville railroad, and likewise, require the exemption of it according to the mileage rule, provided
54 in section 4096, if on that day said railroad should buy out the defendant, notwithstanding the fact that in neither

case the nature, use or situs of any of the property was altered in the slightest. Section 182 expressly recognized the justice of the then existing law, taxing the rolling stock on the mileage basis by continuing that law in force. Taking this section with 171, a rational, fair, just and uniform system of taxation is proclaimed, that cannot possibly be tortured into a scheme to work the oppressive exactions and gross discriminations against such companies as defendant, that would result from the taxation of one under section 4020 and the other under 4096.

It will be observed that section 182 of the constitution applies not only to railroad, but also to "railroad property." "Railroad property" does not necessarily mean property belonging to a railroad. The term is just as applicable to property used in connection with railroads, and for railroad purposes. Defendant's rolling stock and that of numerous corporations which are not railroad companies, is none the less "railroad property."

While the legislature has not extended to companies, other than railroad corporations, the benefit of the equitable basis of
55 assessments provided for by section 182, uniformity and equality of taxation imperatively require that they should be done, and to the extent that defendant has denied this benefit, the act, in the opinion of this court, is unconstitutional, as being violative of section- 171 and 182 of the constitution of Kentucky, and also as denying to such company "the equal protection of the laws" required by section 1 of the fourteenth amendment to the Constitution of the United States. To tax defendant's property which has no situs in this State, in addition — which has such situs, is to impose upon this class of property a greater burden than that required to be borne by another species of taxable property, to-wit: the franchises of various corporations taxable in proportion to gross earnings in and out of this State under section- 4079 and 4080 and by mileage system under section 4081. This tax, it will be seen from those sections, is imposed alike upon both residents and non-residents. It is difficult to see upon what theory of justice, equality or uniformity, the State exacts tax upon the tangible property of its citizens, which is located elsewhere and not protected by its laws, and exempts tangible property (no less valuable and receiving precisely the same protection), in proportion to gross earnings
56 or mileage, out of this State. Under sections 174 and 181 of the constitution of Kentucky, precisely the same power to tax franchises, as tangible property is conferred and that power having been exercised, it is imperative, that equality and uniformity should be observed.

Counsel for defendant cite numerous authorities upon the proper interpretation of provisions "within the territorial limits," "within the city," &c. These authorities are not regarded as especially helpful in this case as the statutory provision, sec. 4020, expressly transcends all territorial limits, and the provision of the constitution sec. 171 limits its operation not to property within the territorial

limits of the taxing power, but to property "subject to taxation" within such limits. The case of Commonwealth *v.* The American Dredging Co., 1 L. R. A., 238, is somewhat similar to the case at bar, and while not interpreting precisely the same constitutional or statutory provisions, it forcibly enunciated a sound and correct principle for the taxation of property under very similar circumstances. The court here says:

"This rule (that of situs of personalty following domicile of its owner) is doubtless true of intangible property, such as bonds,
57 mortgages and other evidence of debt; but the better opinion seems to be that it does not hold in the case of visible, tangible, personal property permanently located in another State. In such cases it is taxable in the jurisdiction where found and is exempt at the domicile of the owner."

The justice of this method of taxation is strongly supported by the following authorities:

People *ex rel.* &c. *v.* Campbell, 21 N. Y. Supp., 8, 48 N. Y. St., 817;
Hoyt *v.* Commissioners, 23 N. Y., 227;
Commonwealth *v.* D. L. &. W. R. R. Co., 145 Pa. St., 96.
See also note to City of New Albany *v.* Meekin, 56 Am. Dec., 523;
Swift's Estate, 32 N. E., 1097.

While these cases most ably defend the justice of this system of taxation, they do not apply to the extent of denying the power of the State to tax by express legislation, property of its citizens without its territorial limits and having a taxable situs elsewhere.

Since the submission of this case, the Supreme Court of the
58 United States, in the case of Commonwealth *v.* The Louisville and Jeffersonville Ferry Co., on Feb. 23rd, 1903, has delivered an opinion more thoroughly decisive of this branch of the case at bar, than any to which this court's attention has been called, though the foregoing conclusions had, in the main, been reached before that opinion was read. In the course of quite an extended opinion, the Supreme Court says, quoting from Chief Justice Marshall in McCullough *v.* Maryland, 4 Wheat., 316, 429:

"While all subjects over which the sovereign power of a State extends are objects of taxation, those over which it does not extend, are, upon the soundest principles, exempt from taxation."

Further on, approving and citing Cooley on Taxation, the same opinion says:

"A State can no more subject to its power a single person or a single article of property whose residence or legal situs is in another State, than it can subject all the citizens or all the property of such other State to its power."

Still further on, the opinion continues:

"The ferry franchise derived from Indiana is an incorporial
59 hereditament derived from and having its legal situs in that State. It is not within the jurisdiction of Kentucky. The

taxation of that franchise or incorporial hereditament by Kentucky, is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the fourteenth amendment of the Constitution of the United States; as much so as if the State taxed the real estate owned by that company in Indiana."

In concluding this opinion, the court says:

"We decide nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its situs, for purposes of taxation, in Indiana."

If the situs of property, "for purposes of taxation," in another State, is sufficient, as this case clearly holds, to deprive Kentucky of the power to tax such property, then it follows conclusively and irresistably, that to the extent, the property of this defendant has such situs elsewhere, the taxing power of this State cannot reach it.

60 It is furthermore contended that if defendant, solely because it is a resident of Kentucky, is to be taxed upon all of its property, without regard to its situs, while other companies doing a similar business in this State, but being non-residents, are to be taxed only upon that portion of their property which has acquired a situs here, such non-resident corporation would thereby "be allowed to transact business within the State upon more favorable conditions than are prescribed by law to similar corporations organized under the laws of this Commonwealth," thereby violating sec. 202 of the Kentucky constitution. While this character of discrimination is, perhaps, not of the character the framers of the constitution had in view, it unquestionably comes within the spirit of the inhibition. The State could with as little violence to this section, offer premiums and bounties to non-resident corporations, a lower tax rate, or entire immunity from taxation, or taxation upon a part of its property, while all the property of its resident rival, was taxed.

In view, however, of the conclusions reached upon other branches of the case, it is not necessary to discuss this question at greater length.

61 Paragraphs 4, 5, 6, 10 and 16, asserting defenses, which the foregoing views tend to sustain, the demurrers to each of said paragraphs are overruled.

March 23rd, 1903.

JAMES P. GREGORY, Judge.

The reply referred to in the foregoing order is as follows:

Jefferson Quarterly Court.

COMMONWEALTH OF KENTUCKY, by W. L. WELLER, JR., Revenue Agent of Jefferson County, Kentucky, Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant.
} Reply.

1st. par. The plaintiff, for reply to the fourth paragraph of defendant's answer, denies that defendant's real place of business
62 at all or either of the times mentioned in plaintiff's statement herein, was at St. Louis, Mo., or that at no time has the defendant had, or that it has not now any property of any character or description within the county of Jefferson or State of Kentucky other than the cars as shown or alleged in said paragraph of defendant's answer, or that defendant's refrigerator or box cars are made personalty by section 212 of the constitution of this State, or that said section refers to any personal property other than that which belongs to a railroad corporation or company in this State.

Plaintiff states that it has no knowledge or information sufficient to form a belief that defendant's business consisted or consists in leasing its cars to whomsoever desired them, and plaintiff denies that at none of the times mentioned in plaintiff's statement was any of said cars located within the county of Jefferson or State of Kentucky, or that none of the same, except as shown or stated in said paragraph, was within said county or State, or that the cars shown, alleged or admitted to be within the said county or State at the times set forth in plaintiff's petition and said paragraph of defendant's answer were not assigned or located here, but were merely passing through, or that said cars constituted at all of the times, or
63 either of them, mentioned in plaintiff's statement, or now constitute, all of the property of the defendant, or that in the years stated in said paragraph of defendant's answer, the defendant was the owner of only the number of cars stated in said paragraph of its answer.

Plaintiff states that it has no knowledge or information sufficient to form a belief that the defendant kept no record of or has no means of knowing certainly or exactly how many of its said cars were within this county or State at any given time.

Plaintiff denies that by dividing the gross earnings of defendant in the State of Kentucky in each year, or the gross earnings per car in each year, the average number of said cars within the State of Kentucky each year is or can be found, or that defendant's gross earnings in Kentucky, the average gross earnings per year, or the average number of its cars within said State for each of the years mentioned in the statement were or are as stated in said paragraph of defendant's answer, or that none of the defendant's cars was new, or that the average value throughout the period covered by plaintiff's

statement herein filed was only between $150 and $200 or less than $1,000 per car.

64 Plaintiff denies that all of defendant's cars were or that either of them was at all or either of the times mentioned in plaintiff's statement actually located within other States, or assigned principally or at all in the Northwestern States, or that only a small proportion of its business was or is done in Kentucky, or that its cars are, or that either of them was, taxable wherever found, or that defendant pays taxes upon them in various other States or any other State, or that the defendant has never escaped or sought to escape taxation elsewhere upon the ground that it was or is a corporation organized and existing under the laws of the State of Kentucky.

Plaintiff denies that only so much of defendant's property as was actually within this State in each of the years mentioned in the statement or was protected by the laws of this State, was or is liable to assessment or taxation by this State and county, or that defendant's cars being movable, tangible property have acquired an actual situs elsewhere or that the same are not liable for assessment or taxation at the domicile of the owner, or that to hold otherwise would result

65 in a violation of section 13 of the constitution of the State of Kentucky, which prohibits the taking of private property for public use without just compensation.

Plaintiff denies that the taxation of all of the defendant's personal property, tangible and intangible, in this State and county, would be the taking of private property for public use without just compensation.

2nd par. The plaintiff, for answer to the fifth paragraph of defendant's answer, denies that in the years 1890, 1891 and 1892, that the number of refrigerator and box cars owned by the defendant were as stated in said paragraph of defendant's answer, or that its business in said years consisted only in leasing said cars to whomsoever desired them, or that in said years, or either of them, all of defendant's said cars were located or assigned elsewhere, or that none of the same was within this State, or that none of them had a situs here, or that defendant kept no record of or has no means of ascertaining certainly or exactly how many of its cars came within this State in either of said years, or that by dividing the gross earnings of the defendant in this State in each year by the gross earnings per car the average number of cars within this State each year is

66 or can be found, or that defendant's gross earnings in this State, the gross earnings per car or the average number of cars within this State in each of said years were or are as stated in said paragraphs of defendant's answer, or that none of defendant's said cars was new, or that their average value throughout said years, or either of them, was only between $150 and $200, or any sum less than $1,000 each.

3rd par. The plaintiff, for reply to the sixth paragraph of defendant's answer, denies that section 4020 of the Kentucky Statutes is

unconstitutional or void in so far as it seeks to subject to assessment or taxation personal property of residents of this State which is out of this State, or that the same is in conflict with section 171 of the constitution of this State, which provides as follows: "They (taxes) shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax," or that the same is in conflict with section 1 of the 14th amendment to the Constitution of the United States, which provides: "No State * * * shall deny to any person within its jurisdiction the equal protection of the laws."

67 4th par. The plaintiff, for reply to the ninth paragraph of defendant's answer, denies that plaintiff's right to institute this proceeding on or before February 10th in either of the years 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900 or 1901, or that this proceeding was or is barred by the statute of limitation by reason of the provisions of section 2515, Kentucky Statutes, as to all or any of the matters prior to June 5, 1897.

5th par. Plaintiff, for reply to the tenth paragraph of defendant's answer, denies that section 4020 of the Kentucky Statutes is unconstitutional or void in so far as it seeks to subject to assessment or taxation personal property of corporations organized or existing under the laws of this State, which property is located outside of this State, or that it is to that extent in conflict with section 1 of the 14th amendment to the Constitution of the United States, or that by said section the defendant is denied the protection of the laws which is offered to railroad companies by section 4096, Kentucky Statutes, or that the personal property of the defendant stands on the same footing or belongs to the same class as railroad property, or the property of railroad companies under the provisions of section 182 of the State constitution.

68 6th par. The plaintiff, for reply to the twelfth paragraph of defendant's answer, denies that the right of plaintiff to maintain this action or proceeding is limited to the five years next preceding June 5, 1902, or that all matters prior to that date are barred, or that either of the causes of action set forth in plaintiff's statement herein prior to that date, or the penalty of twenty per cent. prescribed by section 2241, Kentucky Statutes, upon the amount of taxes collected for any year prior to said date, is barred by the statute of limitations prescribed by section 2515, Kentucky Statutes, or otherwise.

7th par. The plaintiff, for reply to paragraph 16 of defendant's answer, consisting of its supplemental answer, denies that the laws of the Commonwealth of Kentucky provide that companies of a like character with the defendant whose personal property lies partly within the State of Kentucky and partly within other States, shall be assessed by and in the State of Kentucky only upon such proportion of such property as its miles of line within this State bears to the total miles of line within this State and elsewhere, or upon such

proportion as its gross earnings within this State bear to the
69 total gross earnings within this State and elsewhere, or that this is a construction placed upon said laws by the officials of this State in the assessment of personal property of corporations of like character with the defendant, or that to assess the defendant upon all its personal property situated not only within this State or elsewhere, or without this State, will be a violation of the equal protection of the laws guaranteed by the 14th amendment to the Constitution of the United States.

Wherefore, having replied, plaintiff prays, as in its petition, and for all other relief to which it in equity may appear to be entitled.

SAM'L B. KIRBY,
County Attorney,
H. L. STONE,
Attorneys for Plaintiff.

And at a county court continued and held for the court aforesaid on the 6th day of April, 1903, the following order was entered of record, to-wit:

70 COMMONWEALTH OF KENTUCKY, by W. L. WELLER, Revenue Agent,
vs.
UNION REFRIGERATOR TRANSIT COMPANY.

By consent of counsel herein, it is ordered by the court that either party hereto be and is allowed to take proof by deposition as provided by law, and further ordered that within cause be and is passed until the first day of the next May term.

And at a county court continued and held for the court aforesaid, on the 14th day of April, 1903, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, by W. L. WELLER, Jr., Revenue Agent, Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant.

The court's attention having been called to the decision of the court of appeals entered March 25, 1903, in the case of Chicago, St. Louis & New Orleans Railway Company, &c., appellants, *v.* Commonwealth of Kentucky, &c., appellees, it is now ordered that
71 so much of the order heretofore entered on the plaintiff's demurrer to defendant's answer as sustains the same to paragraph 2 of said answer be and the same is now set aside and held for naught, and the court overrules the plaintiff's demurrer to that paragraph of defendant's answer, to which plaintiff excepts.

And at a county court continued and held for the court aforesaid on the 4th day of May, 1903, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, &c.,
vs.
UNION REFRIGERATOR TRANSIT CO.

Came defendant by its counsel and filed rejoinder herein.

The rejoinder referred to in the foregoing order is as follows:

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, &c., Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT CO., Defendant. } Rejoinder.

72 For rejoinder to the first paragraph of the plaintiff's reply herein, the defendant denies that the average value of defendant's cars was not less than one thousand dollars per car.

2. For rejoinder to the second paragraph of the plaintiff's reply, the defendant denies that the average value of defendant's cars was — less than one thousand dollars each.

FORCHT & FIELD,
Attorneys for Defendant.

The following bill of exceptions was filed May 14th, 1903:

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by, etc., Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant. } Bill of Exceptions.

Be it remembered that on the trial of this cause the Commonwealth read in evidence the deposition of S. P. Vickroy, and the exhibits attached thereto.

73 Depositions of witnesses produced, sworn, and examined on the first day of April, 1903, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the office of Given Campbell, Esq., Century building, cor. Ninth and Olive streets, in the city of St. Louis and State of Missouri, before me, Frank Weller, a notary public within and for the aforesaid city and State, in a certain cause now pending in the county court of Jefferson county, Kentucky, between The Commonwealth of Kentucky, W. L. Weller, Jr., revenue agent for Jefferson county, Ky., plaintiff, and The Union Refrigerator Transit Company, defendant, on the part of the plaintiff.

S. P. VICKROY, of lawful age, being produced, sworn and examined, deposeth and saith:

Direct examination by Colonel STONE:

Q. Please state your age, residence and occupation.

A. My age at my nearest birthday is 42 years of age; occupation, comptroller of the Union Refrigerator Transit Co.

Q. Your residence?

A. St. Louis, Mo.

Q. How long have you been connected with the defendant company in that capacity?

74 A. I have been connected with the defendant company since its inception, and in that capacity, as near as I can say, about 7 years.

Q. In a general way, what are your official duties?

A. I have charge of the accounts of the company, countersign all checks, the preparation of all statement-, and have charge of all the ordinary duties appertaining to the office; sign the drafts for mileage, countersign checks in payment, examine bills that are presented and see that they are correct, pass on the vouchers, and attend to the financial matters of the company.

Q. Do you keep an account of the receipts and disbursements of the company?

A. They are kept under my jurisdiction. I don't keep them by my actual hand.

Q. The company was organized under a different corporate name from that which it now has, was it not?

A. Yes, sir.

Q. Do you remember the first name?

A. Yes, sir. It was organized in the latter part of 1899 as the Polar Equipment and Transit Co.

Q. Were you one of the original incorporators?

A. I was not, no, sir.

Q. How soon afterward did you become interested in the company?

A. Well, in a clerical way, I was interested in the com-
75 pany from its inception. I was at that time clerk in the auditor's office of another company, I think almost from its inception I had more or less connection with the company.

Q. Who are the officers of the company at the present time?

A. Mr. E. L. Phillips is president. Mr. Reid Northrup vice-president. Mr. Morehead, secretary and treasurer. Mr. Given Campbell is the general counsel and I am comptroller.

Q. The authorized capital of the corporation, I believe, was two million dollars. How much of that capital has ever been subscribed for or paid up?

A. Well, that capital has been paid up in the nature of paying car trust notes on the cars. I do not believe that there was any cash capital paid into the company.

Q. Will you please explain how the capital was thus paid into the company; on what basis it has heretofore acted?

A. When the cars were built stock was issued to the various people on the basis of the equipment; every time there was any equipment built and put into the company, stock was issued on the basis of a thousand dollars a car,—each car that was so built.

Q. To the builder or contractor for furnishing the car?

76 A. To the various stockholders at that time; the various people that were interested.

Q. You mean to say that those who were then interested furnished cars for the company?

A. Well, those that were interested certainly must have furnished the cars to the company, because the company didn't have any cash capital.

Q. What is the present capitalization of the company?

A. Two million dollars.

Q. Has that all been taken up?

A. All issued, yes, sir.

Q. And is that paid up stock?

A. Yes, sir.

Q. What is the par value of each share?

A. One hundred dollars.

Q. What is the market value of the shares of this company to-day?

A. I don't think it has any market value.

Q. Has it ever been put upon the market for sale?

A. It has been sold at various times, but it has no market value; you could not trade in it on the market; you could not sell it.

Q. What has been its salable value then in the transfers that have been made of the stock?

A. Well, it has sold as low as six or seven dollars a share, I think, and as high as twenty-five dollars.

77 Q. Within what period has it sold at twenty-five dollars per share?

A. In the last four or five years there has been a few shares changed hands at that price.

Q. How many stockholders are in the company now?
A. About fifteen or eighteen.
Q. Has the company a fiscal year?
A. Yes, sir.
Q. When does that end?
A. With the regular year.
Q. It is the same as the calendar year?
A. Yes, sir.
Q. Of what do the assets of the company consist?
A. They consist of its cars, the material that it has on hand for the purpose of repairing the cars, some machinery for the same purpose, and a few buildings at Milwaukee, and of course the cash on hand and in bank at that particular time, and the accounts collectable.
Q. What were the receipts gross and net for the fiscal year ending December 31st, 1896?
A. Gross, $301,899.34. Net, $49,002.23.
Q. Please answer the same question for the fiscal year ending December 31st, 1897, 1898, 1899 and 1900.
A.—

1897, gross,	$327,798.56.	Net, $45,119.06.
1898,	$322,446.34.	Net, $2,803.62.
1899, gross,	$315,573.56.	Net, $16,871.63.
1900, gross,	$329,349.57.	Net, $13,969.08.

78 Q. Please state what portion of the gross earnings for those years were expended, if any, in new equipment or additional equipment for the company.
A. Well, when a car is destroyed—we have not added to our equipment since 1893. When a car was destroyed the amount necessary to replace it was charged to expense account; included in the expenditures. If a car is destroyed or damaged by a railroad company or otherwise, that is included in the item of car repairs. So I could not give you an answer to the question in the way it is asked. I cannot say what part the car repairs covered—for instance if the side of a car was torn off, I could not distinguish it in the amount at the present time without considerable labor and analysis, going back through the various forms that are rendered from the shop, and getting the shop record, which would state how the expenditure is made up.
Q. You could not state the amount of gross earnings then disbursed for betterment or keeping up the cars already owned by the company?
A. Yes, I have that.
Q. Please state that for each of the years I have inquired about.
A. For the year ending December 31st, 1896, we spent $98,260.73 for repairs.
79 Q. What does that include?
A. That includes—if there was a car destroyed or damaged

and had to be replaced in order to make the complement of the equipment full, the cost of it is included in those figures.

Q. To put them in condition and running order again?

A. Put them back into condition and running order. The equipment being two thousand cars, when one was destroyed we never increased the equipment. Whatever replacement was necessary to be done, it was done and charged into the expense account, so as to maintain the equipment.

Q. That is the first year?

A. $98,260.73 for the first year.

Q. What is the next year?

A. December 31st, 1897, $116,001.26.
1898, $150,456.95.
1899, $127,152.59.
1900, $130,405.06.

Q. If you can, from your books, please state the general items showing the disbursements of the gross earnings, leaving the net earnings as you have already stated.

A. I have them all here. The first item is 1896, car rentals. That is the car trust note which is a conditional sale. It is rental; charged as car rental until it is paid. Any time we stop pay-
80 ment, under the car trust, the owners take the car. The first item is car rental, car trust notes, $104,412.60. $73.60 paid during that year for stationary and printing. Commissions, $32,182.04. That represents commissions paid to shippers for loading cars. Legal expenses, $1,919.00. Office, $69.30. Salaries, $11,395.00. Traveling, $820.96. Rent, $240.00. Interest, $1,259.21. Taxes, $284.67. Insurance, $1,980.00.

Q. Now take the other years in their order, please.

A.—

1897, the same for car trust note, $104,412.60. Stationery and printing, $69.92. Commissions, $42,708.20. Insurance, $1,653.60. Interest, $1,388.87. Legal — $1,411.58. Office, $70.22. Rent, $250.00. Salaries, $13,055.00. Taxes, $98.60. Traveling, $1,559.71.

1898, car trust notes, $104,412.60. Stationery and printing, $95.80. Commissions, $41,108.53. Insurance, $1,419.10. Interest, $1,736.06. Legal, $1,932.53. Office, $121.61. Rent, $340.00. Salaries, $15,802.50. Taxes, $268.43. Traveling, $1,948.61.

1899, car trust note, $104,412.60. Stationery and printing, $159.02. Commissions, $43,429.93. Insurance, $777.50. Interest, $2,341.15. Legal, $925.93. Office, $272.30. Rent, $360.00. Salaries, $16,465.00. Taxes, $1,020.94. Traveling, $1,384.97.

81 1900, car trust note, $104,412.60. Stationery and printing, $109.90. Commission, $47,417.60. Insurance, $242.50. Interest, $1,366.67. Legal, $8,153.07. Office, $319.77. Rent, $560.00. Salaries, $18,185.00. Taxes, $3,196.32. Traveling, $1,012.00.

Defendant's counsel objects to all of above testimony as irrelevant.

Q. Will you please explain the item of car trust notes, that

you have mentioned, how that claim originated,—how it is that the company paid up the same amount each year for that purpose?

A. It is the purchase notes of the equipment, but the seller retains the title until the entire amount is paid. If we made default in the note we would have obtained no title.

Objected to as before.

Q. When was that indebtedness incurred by your company?

A. The indebtedness was incurred at the beginning of the company. That is, each time any cars were built they were built in that way; there was a mortgage given—a car trust given to cover the equipment.

Q. What extent of the equipment was that indebtedness incurred for? How many cars?

A. For all the cars. All the cars as they were built; for
82 the entire two thousand cars. Every time there was a car built there was a car trust. That was the nature of the payment for the cars—a car trust.

Q. When were they purchased?

A. I would have to get the car trusts if you want the exact date.

Q. Give it approximately?

A. They were purchased—you can tell by the answer when they came into existence. They came into existence during 1890, 1891, 1892 and 1893. I think the entire complement of cars were in service in 1893.

Q. The company then owned in all those years about which I have asked you, beginning with, say, September 15th, 1896, up to September 15th, 1900, the same number of cars?

A. Yes, sir.

Q. About that?

A. About that number of cars. That was subject to variation on account of cars destroyed, but it never was increased beyond two thousand. It may have been five or ten less that were destroyed, which were undergoing adjustment for the loss or being repaired.

Q. The object of the company was to keep up the same number of cars—maintain that number in condition to be operated?

A. Yes, sir, we were obliged to do that by the terms of the car trust.

Q. Were those cars purchased from the same manufacturer?

83 A. The Union Refrigerator Transit Company acquired title from the same party, which was the Railroad Equipment Co. of New Jersey. The Union Refrigerator Transit Company did not know the builders in the transaction at all.

Q. Well, the purchase was made from the Railroad Equipment Co. of New Jersey?

A. Yes, sir.

Q. Where is its place of business?

A. Its place of business is in New York city. It is in the hands

of a receiver now, being wound up. W. J. Curtis is the receiver, in New York city.

Q. Can you state approximately the cost of those cars as purchased from that company by your company?

Objected to.

A. I can show you the car trust. We paid the Railroad Equipment Company.

Q. I mean the agreed purchase price?

A. The Union Refrigerator Transit Company gave—I have the record of this matter on my books; that shows what they gave. I could get the book and show you the exact amount.

Defendant's counsel objects to above question.

Q. Would you make an exhibit of that showing the cost of the cars which the company owned, say, on September 15th, 1896,
84 and on up through the succeeding five years.

A. All the property was in existence the same in 1896 the same as it was in 1900. That car trust was written December 31st, 1894; that covers the equipment.

Q. And you say it is payable by the month?

A. Each month we pay a car trust note, yes, sir.

Q. Aggregating something over $104,000 per annum?

A. Yes, sir, it was at that time during that period.

Q. How long did that indebtedness have to run before it was extinguished?

A. That indebtedness was—in 1894 we had a large monthly note which we were unable to pay. We had the monthly payment cut down to that basis, and it was covered by 144 consecutive monthly notes, running twelve years; the final payment fell due at the end of the twelfth year.

Mr. CAMPBELL:

(Q.) How much was that?

A. One million three hundred thousand dollars, principal and interest. In 1894 when it was written it was covered by 151 notes: One hundred and fifty were for $8,701.05 each, and the other one was for the fraction, thirty-two hundred and some odd dollars. The several notes fell due at the end of the twelve years. Numbers
144 to 151 fall due at the period December 10th, 1906. That
85 was drawn in December—if the company meets the indebtedness up to that last named date as it has heretofore, it will have fully discharged the debt. That is if it has continued in that way, but by reason of expenses, we had to get a further extension in the year 1902. We reduced the payment from $8,701.05 to $5,000.00 per month.

Q. Do those 151 notes, in other words, represent the pruchase price of those two thousand cars?

A. Represents the amount unpaid plus interest.

Q. In 1894?

A. In 1894 it represented the unpaid amount plus interest to maturity of each note. The notes did not bear interest. Interest was included in that amount. In other words, we paid a fixed amount. Did not pay the amount with interest added from day to day.

Q. What was the purchase price of each of those 2,000 cars?

A. I cannot give that of- hand. I can get the book and show that the Union Refrigerator Transit Company—show what paper they issued in payment of the cars.

Q. It is not necessary to do that, except to ascertain for your own satisfaction what it cost per car to the company?

A. I think the obligation of the Union Refrigerater Transit Co. was on the basis of about $500 to $650 a car. Some of the box cars were less than refrigator cars, and some more. I think the
86 obligation of the company was from $500 to $650 per car for the cars.

Q. That is when they were first purchased?

A. Yes sir.

Above question objected to.

Mr. CAMPBELL:

Q. That is, from the railroad equipment Co.?

A. Yes, sir. We did not purchase from the car builders.

Col. STONE:

Q. That is the whole number of cars?

A. Yes, sir.

Q. What class of cars are they? *A.* Are they all alike or graded?

A. Well, they are different. There are box cars, ventilated cars, and refrigerator cars, and the box cars are almost the same as the ordinary railroad company box car.

Q. Now how many were there of that class?

A. Two hundred of that class. Two hundred box cars.

Q. Do you know what they were priced at, or what they cost the company?

A. I do not.

Q. Go ahead and give the other different classes?

A. There was 100 ventilated cars; they are practically a box car with a ventilator in them. They are used for hauling bananas and thinhs of that kind that would not take a car that was entirely closed. They had to have ventilation at both ends of the car. Sup-
87 pose bananas are hauled in box cars, and other things of like character, there is a heat arising from them and unless is escapes, it cooks them. Then we have refrigerator cars that are insulated, and they have no ice tanks in the ends of them. They are insulated. The brewers prefer an equipment that has no ice tanks in it, because they put the ice on top of the barrels or kegs of beer. It is not like hauling butter, or things of that kind, where the tem-

perature is reduced and they *they* throw the ice on top of the whole thing. Throw the ice on top of it. The tanks in the end of the car simply prevents loading space, and are of no advantage, and we had a lot of cars built without ice tanks in the end, but which are insulated.

Q. How many of that class?

A. I should say all, with the exception of about 300 or 350 of our cars not included in the other equipment; say about 1350; would not be positive of the exact number of cars, but approximately that is right—about 1350 cars have not any tanks in them.

Q. That includes box cars?

A. No, sir, not including box cars. We have about 300 to 350 that have tanks in them. Ice boxes in them.

Q. That is 1350?

A. Yes, sir. Then we have about 350 cars in the next class that are equipped with ice tanks in the end.

88 Q. Can you give approximately the value of the 200 box cars?

A. At the present time.

Q. Say September 15th, 1896, and each succeeding September 15th up to 1900?

A. What do you mean? The value, including—if we had gone into the market to buy some like it?

Q. As they were at those dates.

A. At those dates? I would say from our purchase of similar equipment in 1897, we bought from a refrigerator car company that had been in the same service about 95 cars that had been in the same service, and paid $205.00 apiece for them. That is the best that they could get for them.

Q. That is the box cars?

A. Refrigerator cars.

Q. I am asking about box cars. Let us get one thing at a time.

A. We did not buy any box cars except at first. I can't say what the value would be.

Q. What were the 200 worth that you owned on September 15th, 1896, and each September 15th, up to 1900? Speaking of the box cars alone? As you maintained them and equipped them all, ready for business, after that time?

A. Don't believe we could have sold those box cars at any of those times—I don't think we could have disposed of them for $150.00 apiece.

89 Q. Do you mean to say they were not worth more than that?

A. I want to state as to the box cars that they were not of any great value. I will simply say from our purchase of refrigerator cars, which are classed as a higher character of car, during the same period, we could not dispose of them for more than that.

Q. I am not asking for what they were sold at. I want your estimate of the value, with the knowledge you had of them.

A. My knowledge of that class of cars was, if we were not compelled to maintain them, under the terms of the car trust, we would have saved money by turning them out on the side track, and not operating them at all.

Q. What was their value, all things considered.

A. I would say the box cars were not worth $150.00 apiece, to the best of my knowledge.

Q. Well, what were they worth?

A. I would say $125.00 would be their full value.

Q. Now take the other 100 box cars that you say were ventilated. What were they worth at the same date?

A. Perhaps they were worth $150.00.

Q. What was the value of the 1350 cars that you have mentioned at the same date?

90 A. I say, we purchased in February, 1897, 95 similar cars for similar service at $205 apiece, so I guess that must be about the value.

Q. I am not asking as to your purchase, I am asking your estimate as to the value of these 1350 cars owned by the company, as they were kept up and maintained at each of the dates mentioned.

Objected to.

A. That is the only thing I have to get my knowledge from, Colonel. The only thing that I have to get my knowledge of the cars is from what we paid for cars during the same period—a similar class of cars.

Q. You know what you paid for those identical cars?

A. Well, I don't know—a man sometimes buys things that are not worth what he pays for them. A man may buy real estate, and pay what it is worth, or it may be worth less.

Q. What was the 350 cars worth that you have mentioned in which you carried a tank?

A. About $300.

Q. At those dates?

A. That may be, at those dates; yes, sir.

Q. What were those cars carried at and valued at as assets of the company, on the books of the company? Those several classes, during that period?

A. I believe I said those cars were taken up on the books,

91 and stock was issued for them on the basis of $1000 for each car. The stock was distributed to the shipper and other people interested in the operating of the cars.

Q. You mean all those several classes? No distinction?

A. There was no distinction made. There was 2000 cars that were capatalized at $2,000,000. That is the sole assets.

Q. They were carried as such?

A. Yes, sir.

Objected to.

Q. Carried in that way?

A. Yes, sir, to offset the $2,000,000 capital. On one side of the books was $2,000,000 capital and the other side of the books to offset that was 2,000 cars valued at $2,000,000.

Q. Has any dividend been declared by this company during the fiscal year ending December 31st, 1896, up to December 31st, 1900, and, if so, what?

Defendant's counsel objects to the above, and preceeding question.

A. In 1896 there appeared to be $19,000 declared. The balance of the net earnings was charged off against the stock dividend. In other words, it was simply written off the books. Some of the items that were charged as assets as we went along were considered
92 of no value. $30,000 was written off the books. In our account it was carried as against the equipment account. We had made betterments under the safety appliance law; betterments in the way of brakes and couplers, etc., and we carried it as an asset, and that account was afterward reduced by those amounts. In other words, we had it as an asset, but it was not really an asset, it was a betterment, and should have been originally charged to expense. We absorbed the balance of it by book-keeping.

In 1897 there was a divedent of $20,000 declared. In 1898 there was no divedent declared. In '99 there was no dividend declared. In 1900 there was a divedend declared of $30,000. $69,000 was declared as dividend during the entire period.

Q. At the end of each of these fiscal years what was the total cash assets of the company?

A. You mean the net cash assets?

A. Yes, on hand.

A. You mean accounts collectable and the cash, less the accounts payable? You mean net?

Q. Yes, sir.

A. Well, that is practically the undivided net surplus that you are trying to get at?

Q. Yes, sir, that is what I mean.

Objected to.

93 A. We had cash assets on one hand and we had offsetting that notes and accounts payable on the other side.

Q. What were the cash assets, bills payable, etc., at the end of each of those fiscal years?

A. In 1896 when we closed the books the full amount of cash and the amount of accounts collectable was offset on the other side by notes we had in the bank. Accounts we owed other people for materials. The balance was wiped off by absorbing the original charge.

In 1897 we carried to the undivided surplus account $5,119.06.

In 1897 there was a dividend of $20,000. At that time we had to

apply an equal amount with the dividend on the payment of the last maturing notes—car trust notes. So that left it $5,119.06 net assets on hand which was carried to the undivided surplus account.

In 1898 the net earnings were $2,803.62. That was carried to the undivided surplus account. There was no dividend, it was simply added to the assets.

Q. What did the undivided surplus account amount to at the end of each year?

A. 1898, there was $2,803.62 added making a total of $7,922.68.

1899, net earnings $16,871.63. That was carried to the undivided surplus account. Added to the same account.

94 Q. What did the total make at that time?

A. $24,794.31. In 1900 we added again to that account $13,969.08. We declared a divident in that year of $30,000, so it left us a balance of undivided surplus of $8,763.39.

Q. Are you able, from the manner in which your books were kept, to give the undivided surplus on hand of the company of September 15th, 1896, September 15th, 1897, September 15th, 1898, September 15th, 1899, and September 15th, 1900; or can you ascertain, by making up a statement as of those dates, from your books?

A. I could not of September 15th. I could of September 1st or October 1st. We did not close the books in the middle of the month at any time.

Q. Can you——

A. The railroads only report the ear-ings to us by the month. We could not estimate our earnings—could not divide the month as between the fifteenth or the 30th. I could give you the 31st of August or September 30th.

Q. Would you do that in an exhibit and make it part of your deposition?

Objected to.

A. Do you want August 31st or September 30th, or both?

Q. Yes, sir. Can you state the present outstanding in-

95 debtedness in the shape of those car trust notes on the 2,000 cars? Is this indebtedness on the whole 2,000?

A. Yes, sir, it is on the whole equipment. Everything we have out in the shape of a mortgage. We do not call it a mortgage. We call it a car trust note or lease of conditional sale.

Q. State the outstanding indebtedness of the character that you have mentioned on the 2,000 cars. The amount that is yet unpaid.

A. The face of the indebtedness as of date May 10th, 1903, is $418,546.56. That includes the interest to the completion of the car trust.

Q. That is the face of the principal and interest. Due in monthly installments?

A. Yes, sir. The note is now $5,000 per month. When the cars were new we paid a larger note; as they got older we had to make repairs, and the note was reduced.

Q. What is the item of interest you mentioned in the disbursement of the gross earnings each year?

A. Interest paid to the bank. At times our earnings were not sufficient to meet the obligations. In some months, the winter months, we don't earn as much as the expenditures are. We borrow money to pay our current expenses. That covers the interest
96 on current indebtedness. During part of that period it also includes interest. We had a $15,000 bonded indebtedness on which we paid 6 per cent. interest. Part of that interest shown in the early part of it, until the bond was wiped out, is in there also. But it does not include any interest on the car trust, because that is charged up in one item.

Q. How is the business of your company conducted? In what way *so* you obtain revenue from the use of your cars?

A. The railroad companies pay us mileage for every mile run on the cars at various rates.

Q. Are your cars thus rented confined to any certain railroad?

A. No, sir.

Q. Are they used on different railroads throughout the United States?

A. They are used out of Milwaukee. Milwaukee sends them wherever they do business. If we have a car load of beer going to Boston, it goes to Boston. If we have a car load of beer going to Mexico, it goes there. If it is going to Canada, it goes to Canada. We do not control the routing, where they shall take these shipments. That is the principal point from which our business is loaded.

Q. Loaded from Milwaukee?

A. Yes, sir.

Q. All of them?

A. Yes, sir. Well, most of them. The majority of them.
97 Q. Orders are received and filled there?

A. Yes, sir, the shops are there. Our cars are repaired there. We are under contract with the brewers of Milwaukee to furnish cars, and they route them to their customers. If they get an order to send a car anywhere they will load the car there for Canada, or a car load of beer through to New York city. They go everywhere. Canada, Mexico and the United States.

Q. Your cars may then be used on any line of railway almost in the United States?

A. Yes, sir.

Q. The accounting for this use of your company's cars is made here in the central office, in St. Louis?

A. Yes, sir.

Q. Reported from Milwaukee?

A. Reported from the road direct to us.

Q. Your cars operate on lines running into or through the State of Kentucky?

A. Yes, sir.

Q. As well as other States?

A. Yes, sir.

Q. Does your company own any real estate anywhere?

A. No, sir.

Q. Does it own any other tangible personal property except these refrigerator cars?

A. The shops and material at Milwaukee. They are on leased ground. The company does not own any real estate. They rent the ground from the St. Paul road. We have the shops there.

98 Q. Improvements located on the real estate?

A. Yes, sir. Not very expensive. The shops are not very expensive.

Q. You have given us an item in the disbursements, in the gross earnings of your company, for taxes. Are you able to state what taxes those were, whether paid to the State of Kentucky or any other taxing authority?

A. They were paid to the taxing authorities from whom we had claims rendered.

Objected to.

WITNESS: The State of Kentucky and Ohio and Colorado.

Q. Are you able to state how much of those items of taxes in the five years I have asked you about was paid to the State of Kentucky or any taxing authority in that State?

A. We paid the city of Louisville, I think, during that period one year's taxes. The city of Louisville, about $1500 or $1600. I think we paid the State of Kentucky about $70 a year. The balance of it was paid elsewhere.

Mr. FIELD: Paid the city $1500.

Col. STONE:

Q. What year?

WITNESS: 1900.

Q. Will you file an itemized statement of the taxes paid by your company for the five fiscal years I have asked you about, beginning with 1896, and ending December 31st, 1900, showing in what

99 States your company has paid taxes and to what taxing authority, and the amount to each, in each of said five years.

Objected to.

Mr. FIELD: At present, as advised by counsel, the witness declines to answer the question or furnish the report, but counsel states that if required so to do by court the witness will answer the question and furnish such statement.

Q. Are you willing to state what States your company has paid taxes to during each of the five years mentioned?

Mr. FIELD: Under advice of counsel, the witness declines to answer the question, under the same conditions as the previous question.

Q. Are you willing to make a statement of the taxes paid to the State of Kentucky, the city of Louisville, or Jefferson county, during each of said five years, and make it an exhibit to your deposition?

A. Yes, sir.

Q. Did your company pay any taxes during either of the said five years to the State of Missouri or to the city of St. Louis?

Objected to. Witness declines to answer said question, under advise of counsel, subject to the same assurance on part of counsel regarding production of same under order of court at the trial.

100 Q. Will you furnish a statement of the taxes paid by your company, if any, to the State of Missouri and the city of St. Louis, for the fiscal year ending December 31st, 1896, 1897, 1898, 1899 and 1900?

Witness declines to answer said question or furnish a statement, under the conditions attached to the former question.

Q. Has any formulated or printed statement of the business of the defendant company been made in each of the fiscal years commencing with that of 1896 up to and including that of 1900 to the stock holders of the company?

A. Printed statement? No, sir.

Q. Any report made of the business of the company to the stock holders during either of those five years?

A. I think not. I think there has been no formal report made of any kind.

Objected to.

Q. What officer of the company would make up this report, if one had been made?

A. I would.

Objected to.

Q. You have no recollection of making it up?

A. No, sir, except those reports that you have here, that I am using here myself. Those reports are for our own guidance. But that is not for the stock holders.

101 Q. Those are books of account kept by you or under your supervision?

A. Kept in the office, yes, sir. If any stock holder wanted to know, he might have come in and asked. I don't remember of anybody doing so. They are mostly all acquainted with the business.

Q. The cars of this company have been paid for, I understand, so far, practically out of the earnings of the company?

A. Yes, sir, so far as the company is concerned.

Q. Neither one of those stockholders advanced any money or anything on his stock?

Objected to.

A. I won't say there wasn't anything advanced, but there was nothing materially advanced on the stock. There may have been some advances for the necessary expenses of the inception of the company.

Q. Whatever assets this company has acquired or now owns were paid out of the earnings of the company?

A. Yes, sir.

Cross-examination by Mr. FIELD:

Q. Mr. Vickroy, how many cars, or what property did the Union Refrigerator & Transit Company have in the State of Kentucky, county of Jefferson, 1896?

A. It had no cars except those cars that were passing through.

102 Q. Did it have any other property of any description in the State of Kentucky, county of Jefferson, at that time?

A. No, sir. *are kept by cold air.*

Q. How many cars were in the State of Kentucky on that day?

A. I would be unable to state how many cars.

Q. You kept no record of the movements of your cars?

A. Yes, sir, we kept a record——

Q. Of the location?

A. Not at any particular time. We know what road they are on, but we don't know what State they are in. For instance, a car delivered to the L. & N. East St. Louis would be on the L. & N. until it was delivered off the line to somebody else. We could not tell what portion of that road it was on. In the same way it might be on the Baltimore & Ohio Southwestern or the Southern railway.

Q. Have you any method of ascertaining how many cars were constructively, at least, within the State of Kentucky, in the year 1895?

A. Yes, we have one that was adopted in making tax returns by other States.

Q. Please give the method and state how many cars were in the State of Kentucky in the year 1895?

A. Well, for the year 1895 I took the total earnings returned to us by the various roads over which we made mileage,

103 or in any way touched the State of Kentucky. I took the total amount that they returned us for mileage, and I took Poor's Manual and ascertained how much of their mileage returned to us as being the miles made in Kentucky and divided the amount so obtained by the average earnings for all the cars made everywhere. That gave an approximation of the cars in the State of Kentucky for the year 1895. It amounts to $2780.94. The average gross earnings for a car for the year were $131.26. It made 21 cars constructively in the State of Kentucky at that time.

Q. For 1896 what was the result?

A. The proportion shows that within the State of Kentucky there

was $4,702.32. The average earnings was $150.95. That showed 31 cars constructively in the State for that year.

Q. 1897?

A. In 1897, the total earnings in Kentucky were $4,511.60. The average earnings for a car was $163.90. Twenty-eight cars constructively in the State.

Q. In 1898?

A. In 1898, the Kentucky proportion was $4,676.24. The average earnings per car $161.22. Twenty-nine cars constructively in the State.

Q. The next year?

A. 1899, the Kentucky proportion was $6,263.50. Average earnings $157.78. The constructive number of cars was forty.

104 Q. 1900?

A. The Kentucky proportion was $11,048.67. The average earnings $164.57. Sixty-seven cars constructively in the State.

Q. Were any of those cars assigned to any place in Kentucky, or located actually in the State of Kentucky?

A. None of them were assigned actually to the State of Kentucky. I can't say whether any of them were located—I don't know what you mean by the word "located."

Q. Were they or not simply passing through?

A. They may have been passing through, or may have been standing still in the State, but they were not assigned there.

Mr. CAMPBELL: They were not at any particular place, then?

A. No, sir. Not to my knowledge. We had no shippers there, if that is what you mean. We had no brewing interests or nothing of that kind. I know of no freight that originated there. I won't say that there was not a car that would come past a station maybe and sometimes it would be loaded, they would put something in it, but we would not have any knowledge of that. If *if* was taken there and used in local service we would have no way of distinguishing. If the car was on the Baltimore & Ohio Southwestern in Kentucky,

105 passing back through its natural channel to Milwaukee, it may have been loaded and unloaded three or four times on the line and we know nothing about it. We didn't get any report on it, anyway.

Q. What is the fair cash value of those cars, estimating at a price they would bring at a voluntary sale?

A. All of them taken together.

Q. During those years.

A. As I say, based on our experience of purchasing, where people wanted to sell the cars and offered them for sale, they could not get any more from them, I would say about $200 a car. We bought cars in February, 1897, 95 cars in this identical service, which are still running, for $205 apiece. I have nothing else to judge from.

Q. What is the average life of the cars of this description?

A. They are constantly being repaired and constantly being used.

I don't know as there is any—when a floor wears out there is a new floor, or a new roof, or new walls put on. In the history of the Union Refrigerator Transit Company we have never scrapped a car for being worn out. It is always kept running.

Q. You are familiar, are you not, with those cars, and their character?

A. I have seen the operation of them ever since the beginning.

Q. At what rate do they deterio-ate in value?

106 A. Well, that is a hard matter to say. There are Master Car Builders' rules which govern in collecting for a car; they try to fix the price for it, but the actual deterioration depends entirely on the service. A car that is in beer service is handled roughly. Take a man loading a car with beer, he throws the kegs in roughly, and when the car comes back to be loaded, it is likely to have a new floor or new sides. Also depends largely on the handling of the switch men in the yards. One switch man will jerk the couplers out or jerk the end sills out. You can't figure on the average deterioration, because it depends upon the use. Cars have got to be maintained; every time they come in from a trip, we never can go on the assumption that this car was repaired the last time it was in the shop; it must be inspected each time. Every time it is billed to a connecting line, it must be inspected. For instance, a car which is delivered yesterday off of a connecting line is delivered back again, and it has to be inspected; so that there is no way that I know of or ever heard of fixing the ratio of deterioration. Cars are inspected each time they are received from one road by another. Every time they pass, if they pass a dozen times in a month, no roads will say "We had that car last week, and know it is al- right." The inspector inspects it. If it has any defect it is carded against the delivering line, or the owner.

107 Q. Does the character and form of refrigerator cars change from time to time? Do some of them become obsolete and have to be scrapped?

A. As a general thing, yes. But as it affects our business, no. There are companys carr-ing other classes of freight than beer that require a higher grade of car, under the rulings of the different freight combinations they use different minimums. Small cars were not able to get the minimum in. They had to be put out of service. Had to put in larger equipment. That refers more particularly to the orange business at California. I think that is foreign to our company's business.

Q. Has the Union Refrigerator Transit Company any new cars?

A. No, sir.

Q. About what is the average of the cars in your service in your company?

A. I should say about 10 or 12 years, maybe more. Say 12 years, that may be the average age of the equipment.

Q. Are those cars of the latest pat-ern and improvement?

A. None of those cars are of the latest pat-ern and improvement

Q. Did the Union Refrigerator Transit Company own on September 15th, 1896, $2,500,000 worth of property? Personalty?

A. No, sir.

108 Q. On September 15th, 1897, did it own $3,000,000 worth of property?

A. No, sir.

Q. On September 15th, 1898 did it own $3,000,000 worth of property?

A. No, sir.

Q. On September 15th, 1899, did it own $3,000,000 worth of property?

A. No, sir.

Q. On September 15th, 1900, did it own $4,000,000 worth of property?

A. No, sir. It owned at none of those times anything more than those cars in question.

Q. Has it any headquarters or place of business in Kentucky.

Objected to as irrelevant, as the pleadings show where the general office is.

Q. Has it any property or did it have any at any time since 1896 in the State of Kentucky other than the cars which you have mentioned as being constructively in that State?

Objected to as being a question of law.

A. No, sir.

Q. Were any of your cars worth, estimating them at the fair cash value that they would bring at a voluntary sale, in any of the years mentioned, as much as one thousand dollars per car?

A. No.

109 Q. Has the company ever sought to escape taxation in any other State or in any other place, on the ground that it was a citizen of Kentucky?

A. Not to my knowledge. I heard Colonel Stone make a statement—reading something down there at the hearing where there was a pleading of some attorney in some State, that that was pleaded. I was not aware of it. None of the officers of the company that I ever heard of were aware that that thing existed. I never heard such a plea as that sanctioned. Colonel Stone read something; I forget what it was.

Redirect examination by Colonel STONE:

Q. While you have given the existing and outstanding indebtedness for the balance due on those cars now owned by your company, can you give the amount that has been paid on the same heretofore?

A. In what period? Of course, the books will show what was paid.

Q. The gross amount paid? I omitted to ask for that.
A. You mean the amount we have paid for those lease warrants? Car rentals.
Q. To the vendor? Not what you paid in the way of repairs.
110 A. You mean the trust notes that we have paid?
Q. Yes, sir.

Objected to.

A. I can't say that off hand.
Q. Will you make a statement of that showing what has been paid heretofore, so as to show what the total outlay has been for cars?
A. Well, that has been for rental and interest. The total payment would not be for cars. It would be more for rentals and interest.

Objected to.
Under advice of counsel the witness declines to answer above question, subject to the same statement as to production in court upon order of court on the occasion of trial of his case.

Q. You have been asked if you could tell how many of the cars of your company were in Kentucky or being operated in that State at certain dates. Are you able to do that with respect to any States?
A. No, sir.
Q. From the nature of the company's business it is impossible, isn't it?
111 A. We could not tell except it was on a road that was wholly within the State, and they had been delivered the car, on that day; then you could state that the car was in the State, because the road only ran within that State. But if a railroad company's line ran within the State and without the State—no.
Q. If you were called on to-day to state where your 2,000 cars were, it would be impossible for you to answer, would it not?
A. We could state the roads they were on, but not in what State they were. Our records will show that there were some on such and such a road by the last report. I could not tell to-day, as our record would be, perhaps, 4, 5 or 6 days old. I could tell the line of road. A car delivered at Chicago to the Wabash railroad may be in Canada or in the United States. We would know that it was on the Wabash line, but our only means of ascertaining about the car is that it is charged to one road, and they report to us when they deliver to a connecting line.
Q. You charged them with the time——
A. We don't work on the per diem plan. We still get mileage.
Q. You have no means of knowing——
A. At what point of the State it is in?

112 Q. What part of a system of a railroad company a car is on at any given date?

A. No, sir, we could not state.

Q. You have been asked about whether your company has endeavored to escape taxation in other States or litigation, by reason of it having been chartered and incorporated in the State of Kentucky. Do you now recall the litigation your company has had with the other States on the subject of taxation?

A. Well, we have had various litigations. I think, however, the only litigation that was carried through the courts—we had things that were settled before they went to litigation. I think in Utah was the only case that we had.

Q. Is that the only case you now recall that went through the courts?

A. Yes, I think that is the only case, with the exception of this previous case we had in Kentucky, the case in Judge Gregory's court; I think that was the only case that went as far as a court proceeding. We had cases in Missouri; we had made returns to pay taxes in Missouri and the law was declared unconstitutional.

Q. I am speaking of actual litigation.

113 A. The only actual litigation, I think, was in the State of Utah and the State of Kentucky.

Q. You have said something about the value of these cars being $205?

A. I simply said I thought that was——

Q. You mean that for these finer cars? Those that have ice boxes in them as well as the box cars or ventilated cars?

A. I gave you the price, I thought, when I said—I spoke of refrigerator cars. We bought 95 cars in February, 1897, at $205 each. I think it was a fair voluntary sale; the people did not have to sell; simply could not find a better purchaser.

Q. I ask if those 350 regular refrigerator cars had ice tanks?

A. Well, an ice tank is $50 or $75 additional in a car,—the two tanks, when it is new. I think the additional cost—our master car builder has figured it up at various times at $50 or $75 to equip with ice tanks, in the end of those cars where the car is already insulated.

Q. I believe you said there were 350 of those?

A. That is approximately so, as near as I can say.

Q. As to the question of deterioration, isn't it a fact that your cars are all practically as good as new, because you maintained them and keep them in condition to be operated all the time?

114 A. I would not say that they were in the condition that new cars would be, but we have to keep them in such condition that the railroads will operate them.

Q. They perform the services they are designed for?

A. Yes, sir.

Mr. FIELD:

Q. I don't know whether or not you stated where the principal offices of the company are actually located?

A. Here in St. Louis. Down stairs; room 453, Century building, if the principal office of the company.

Q. Has your company or not within the various years mentioned paid taxes to any other State than Kentucky, as well as Kentucky?

Objected to, unless witness furnished an itemized statement.

A. We have paid taxes in other States, yes, sir.

Col. STONE:

Q. What other States?

Objected to under advice of counsel, subject to the same conditions as previously stated.

Q. Please give the number of States, without giving the names, that your company has paid taxes in on its property.

115 Objected to, and witness, under advice of counsel, declines to answer above question, subject to the ruling of court as heretofore stated.

Q. Can you state the number of States in which the lines of railroad run on which your cars have been operated during the year 1896, up to 1900 inclusive.

A. I would state offhand all the States in the Union. I can't say positively.

Q. Your best recollection is, however, that they pass over lines in all the States.

A. Yes, sir, that is the concensus of opinion. We have operated in all States.

S. P. VICKROY.

Subscribed and sworn to before me this 9th day of May, A. D. 1903.

FRANK WELLER,
[SEAL.] Notary Public, City of St. Louis, Mo.

My commission expires January 16th, 1907.

I, Frank Weller, a notary public, within and for the city of St. Louis, in the State of Missouri, do certify that by consent of counsel came before me at the office of Given Campbell, Esq., Century building, cor. 9th and Olive streets, in the city and State last
116 aforesaid, S. P. Vickroy, who was by me duly sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined, and the examination reduced to writing in shorthand and afterwards transcribed and read over and subscribed by said witness, and said deposition is now herewith returned.

Given at office in the city of St. Louis and State of Missouri, this 9th day of May, 1903.

FRANK WELLER,
[SEAL.] Notary Public, City of St. Louis,
State of Missouri.

My commission expires January 16th, 1907.

Be it further remembered that the Commonwealth read in evidence a certified copy of the articles of incorporation of the Polar Equipment and Transit Company, a certified copy of the amended articles of incorporation of the Polar Equipment and Transit Company, and a certified copy of the amended articles of incorporation of the Union Refrigerator Transit Company.

117 Articles of Incorporation of the Polar Equipment and Transit Company of Kentucky.

We, Reid Northrop, R. F. Balke and Percy Werner, do hereby form and incorporate a company under the provisions of chapter 56 of the General Statutes of the Commonwealth of Kentucky, and as such, we, our successors and assigns, are to have and enjoy all the rights, privileges and immunities therein conferred on incorporated companies organized thereunder so far as the same may be deemed expedient or necessary in the conduct of affairs of the said company, and we adopt the following articles of association, to-wit:

1st. The name of the said corporation is the Polar Equipment and Transit Company.

2nd. The names of the incorporators are Reid Northrop, R. F. Balke and Percy Werner.

3rd. The principal place of business of said corporation shall be in Louisville, county of Jefferson and State of Kentucky.

4th. The general nature of the business proposed to be transacted by said corporation shall be to manufacture, purchase, hire, let, lease, have, own and operate cars for the transportation of what is
118 known as perishable property or perishable freight, merchandise or goods between all points within the United States, Mexico, or the Dominion of Canada, and over and upon any and all lines of railroad with which it may contract for the transportation, forwarding or hauling of such cars and the freight or property therein contained, and to that end the company hereby created may contract upon such terms as its board of directors may deem expedient with any railroad company or companies or *which* any persons owning or operating any railroad in the United States, Mexico, or in the Dominion of Canada, for the use of such cars or the speedy transportation, forwarding and delivery of the cars aforesaid, and of all freight, property, merchandise and goods contained therein at and between any and all points and places either within the United States, Mexico, or the Dominion of Canada, and the said corporation

may buy, sell, own, hire, contract for and have all such real or personal property as the nature of its said business may from time to time require.

5th. The capital stock authorized is two million ($2,000,000) dollars, to be divided into twenty thousand (20,000) shares of the par value of one hundred (100) dollars each, and said authorized capital stock may be subscribed, paid for and issued by the corporation in such amounts and at such times and upon such terms as the board of directors or incorporators may determine.

119 6th. The said corporation shall begin business when these articles are filed for record in the office of the clerk of the Jefferson county court and shall continue for the full term or period of twenty-five (25) years from that day, unless sooner dissolved by vote of the stockholders.

7th. The affairs of the corporation shall be conducted by a board of directors of not less than three nor more than five members, which board of directors will elect from its members, a president, secretary and treasurer, and will appoint such officers and agents as they deem best. Reid Northrop is now elected president and treasurer, and Percy Werner secretary of the first board. The regular election shall be held on the first Monday of March of each year, beginning with 1890. Special elections will be held by the stockholders to fill all vacancies. The board of directors shall prescribe the duties of officers.

8th. The highest amount of liability or indebtedness to which the corporation is at any time to subject itself is three million ($3,000,000) dollars.

9th. The private property of the stockholders is to be exempt from the debts of the corporation.

120 Given under our hands this 31st day of December, 1899.

REID NORTHROP.
PERCY WERNER.
R. F. BALKE.

STATE OF MISSOURI, }
City of St. Louis, } ss:

I hereby certify that on this 31st day of December, 1889, before me, a notary public within and for the city and State aforesaid, personally came Reid Northrop and Percy Werner, known to me to be the individuals described in and who executed the above articles of incorporation, and acknowledged that they executed the same as their act and deed.

In testimony whereof, I have hereunto set my hand and notarial seal the day and year last above written.

HARVEY L. CHRISTIE,
[SEAL.] Notary Public, City of St. Louis, Missouri.

I, Geo. H. Webb, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that on this day the foregoing articles of incorporation were produced to me in my office, and acknowledged and delivered by R. F. Balke, a party thereto, to
121 be his act and deed, and that I have recorded them, this and the foregoing certificate in my said office.

Witness my hand this 2nd day of Jan., 1890.

GEO. H. WEBB, Clerk,
By W. E. BUCKEL,
Deputy Clerk.

A copy—
Attest:
W. J. SEMONIN, Clerk,
By LENORE DURBECK, D. C.

At a special meeting of the stockholders of the Polar Equipment & Transit Company, held this 16th day of May, 1890, all stockholders being present and concurring, it was resolved that the name of the said company be, and it is, hereby changed to the Union Refrigerator Transit Company.

R. F. BALKE, Sec'y.

REID NORTHROP,
PERCY WERNER,
R. F. BALKE,
Stockholders.

STATE OF MISSOURI, } ss:
City of St. Louis, }

122 I hereby certify that on this 16th day of May, 1890, before me, a notary public within and for the city and State aforesaid, personally came Reid Northrop, Percy Werner, stockholders of the above named corporation, who signed the foregoing transcript from the records of the said stockholders' meetings; acknowledged that they executed the same as their free act and deed.

In testimony whereof, I have hereunto set my hand and notarial seal the day and year last above written.

P. S. DROWN,
Notary Public, St. Louis, Mo.

[SEAL.]

My term expires July 2nd, 1893.

STATE OF OHIO, } ss:
County of Hamilton, }

I hereby certify that on this 26th day of May, 1890, before me, a notary public within and for the county and State aforesaid, personally came R. F. Balke, a stockholder of the above named corporation, who signed the foregoing transcript from the record of the said stockholders' meetings; acknowledged that he executed the same as his free act and deed.

In testimony whereof, I have hereunto set my hand and notarial seal the day and year last above written.

CHARLES J. BUERKLE,
[SEAL.] Notary Public, Hamilton Co., Ohio.

123 I, Geo. H. Webb, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that on this day the foregoing amended articles of incorporation were produced to me in my office, and that I have recorded them, this and the foregoing certificates in my said office.

Witness my hand this 27th day of May, 1890.

GEO. H. WEBB, Clerk.

A copy—
Attest:
W. J. SEMONIN, Clerk,
By LENORE DURBECK, D. C.

Amended Articles of Incorporation of the Union Refrigerator Transit Company.

These amended articles of incorporation of the Union Refrigerator Transit Company, witnesseth: That pursuant to a resolution adopted by the stockholders of the Union Refrigerator Transit Company at the regular annual meeting of said stockholders, held at Louisville, Ky., on March 3rd, 1903, the original articles incorporating said company were and they are hereby changed and amended as follows: Said alteration and amendment having been con-
124 sented to in writing by the owners of more than two-thirds of the capital stock of said company. The principal office of the company shall be in Crescent Hill, Jefferson county, Kentucky.

In testimony whereof, the directors of the Union Refrigerator Transit Company have hereunto set their hands and the secretary of the company has set the hand and affixed the seal of the corporation, all this 10th day of March, 1902.

REID NORTHROP,
SANFORD NORTHROP,
S. P. VICKROY,
A Majority of the Directors of the Union Refrigerator Transit Company.

Attest:
UNION REFRIGERATOR TRANSIT COMPANY.
[SEAL.] CHAS. O'MARA, Secretary.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Personally appeared before me, the undersigned notary public this tenth day of March, 1902, Reid Northrop, Sanford Northrop

and S. P. Vickroy, personally known to me to be the persons
125 who signed the foregoing instrument in writing as a majority of the directors of the Union Refrigerator Transit Company, and acknowledged that they signed same as the free act and deed of said Union Refrigerator Transit Company as therein set forth.

ABRAHAM W. BROOKE,
[SEAL.] Notary Public, City of St. Louis, Mo.

My term expires Sept. 27, 1902.

I, W. J. Semonin, clerk of the county court of Jefferson county, in the State of Kentucky, do certify that on this day at 1:35 o'clock, p. m., the foregoing amended articles of incorporation were produced to me in my office, and that I have recorded them, this and the foregoing certificate in my said office.

Witness my hand this 14th day of March, 1902.

W. J. SEMONIN, Clerk.

A copy—
Attest:
W. J. SEMONIN, Clerk,
By LENORE DURBECK, D. C.

126 This was all the evidence offered or read by either party on the trial of this proceeding. The court then rendered the following judgment, to-wit:

Jefferson Circuit Court, Chancery Branch, First Division.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant. } Judgment.

The court being advised, it is considered by the court as follows:

1. That the Union Refrigerator Transit Company was the owner of 2000 cars on September 15, 1897; of a like number on September 15, 1898; of a like number on September 15, 1899; of a like number on September 15, 1900.

2. Said cars and each of them were of the fair cash value at said several times of the sum of $200 each.

3. Said cars were employed by the defendant by renting them to divers and sundry shippers, who took possession of same
127 from time to time, at Milwaukee, Wisconsin, and used them for the carriage of freight over divers and sundry railroads in the United States, Canada and Mexico, the defendant being paid by the railroads in accordance with the mileage made by said cars over their said lines.

4. That the correct method of ascertaining the number of said cars which should be assessed for taxation in Jefferson county, Ken-

tucky, for each of said years, is to ascertain the amount of earnings made by any and all of said cars upon any line of railroad wholly or partly in the State of Kentucky; to apportion the earnings made on lines which are partly within and partly out of Kentucky, according to the mileage of such lines in and out of Kentucky, and by this means ascertain the gorss earnings made by the defendant upon all its cars in Kentucky; then find the total amount of gross earnings made by the defendant, and divide these gross earnings by the total number of cars, to show the amount of gross earnings in Kentucky by the gross earnings made by each car. Following this method, the court finds that there were subject to assessment in Jefferson county, Kentucky, as of,

September 15, 1897	28 cars
September 15, 1898	29 cars
September 15, 1899	40 cars
September 15, 1900	67 cars

128 5. The court therefore finds that the proper assessment to be made against the defendant as of,

September 15, 1897 is	$5600
September 15, 1898	5800
September 15, 1899	8000
September 15, 1900	13400

6. It is adjudged by the court that the defendant owes State and county taxes upon the assessments for the said years as follows: 1898, $51.80, until paid; 1899, $37.58, until paid; 1900, $50.00, until paid; 1901, $102.51; and it is further adjudged that the defendant is liable for penalties as follows: 1898, $10.36; 1899, $7.50; 1900, $10.00; 1901, $20.50; and the county clerk is directed to enter said assessments and to certify the same as directed by section 4241 of the Kentucky Statutes.

7. The court finds that the defendant is not liable for assessment for any years other than those mentioned herein.

8. The court finds that none of the cars of the defendant, other than those herein mentioned, are liable to assessment for any of said years; and to so much of this order as decides that cars other than those mentioned in this judgment are not liable to assess-

129 ment, and that defendant is not liable for assessment for other years, the plaintiff prays an appeal to the court of appeals of Kentucky, which is granted. And to so much of this order as holds that the defendant is liable to any assessment, the defendant prays an appeal to said court of appeals of Kentucky, which is granted. Both parties presented to the court and asked to be signed, a bill of exceptions; and the same is accordingly so signed and made a part of the record.

JAMES P. GREGORY,
Judge of the Jefferson County Court.

May 14, 1903.

And at a county court continued and held for the court aforesaid, on the 29th day of May, 1903, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, by W. L. Weller, Jr., Revenue Agent for Jefferson County, Kentucky, Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant.
} Order Extending Judgment.

On motion of the plaintiff the judgment entered herein on May 14, 1903, is now extended as follows: The plaintiff will re-
130 cover of the defendant its costs herein expended, to be taxed by the clerk, and for which execution may issue.

The exhibit mentioned in the foregoing deposition and filed in court June 5, 1903, is as follows:

Statement Taxes Paid by the Union Refrigerator Transit Company for the City of Louisville, Kentucky, County of Jefferson, or State Treasurer at Frankfort, Kentucky, 1896 to 1900.

1896. Frankfort, Ky., Aug. 7, 1896..... ..... $77.07
Receipt signed by F. H. Johnson, ass't auditor.

1897. Frankfort, Ky., Oct. 22, 1897..... $97.99
Receipt signed by Sam. H. Stone, auditor.

1898. Louisville, Ky., March 26, 1898..... $239.59
Receipt signed by Jas. B. Camp, receiver city taxes.

Frankfort, Ky., June 31, 1898..... 58.23
Receipt signed by F. H. Johnson, ass't auditor.
$297.82

131 June 22, 1898, we received from the State of Kentucky check for $30.00, refund account of over-payment 1897.

1899. Frankfort, Ky., Oct. 2, 1899..... $56.89
Receipt signed by Sam. H. Stone, auditor.

1900. Frankfort, Ky., Sept. 21, 1900..... $70.60
Receipt signed by W. F. Grayot, ass't auditor.

1901. Louisville, May —— 1901..... ..... $1,507.50

I hereby certify that the above is correct.
UNION REFRIGERATOR TRANSIT CO.,
By S. P. VICKROY, Comptroller.

I, W. J. Semonin, clerk of the county court of Jefferson county, in the State of Kentucky, certify that the foregoing eighty-five pages contain a true and complete transcript of the record in the case of

Commonwealth of Kentucky, by W. L. Weller, Jr., revenue agent for Jefferson county, Kentucky, *v.* Union Refrigerator Transit Company.

132 In testimony whereof, I have hereunto set my hand, this 22nd day of May, 1903.

(Signed) W. J. SEMONIN,
Clerk Jefferson County Court, Kentucky.

Plaintiff's clerk's costs	$5.10
Sheriff costs	1.80
Taking and transcribing Vickroy's deposition	22.60
3 copies articles of incorporation, at $1.00	3.00
Total plaintiff's costs	32.50
Copy of transcript	20.75
Total	53.25
Defendant's clerk costs	3.00

Attest:

W. J. SEMONIN, Clerk,
By JOS. J. SCHENE, D. C.

133 At a court held June 11, 1903, the following stipulation was filed:

Jefferson Circuit Court, Chancery Branch, First Division.

COMMONWEALTH OF KENTUCKY, by WILLIAM L. Weller, Jr., Revenue Agent for Jefferson County, Ky., Appellant,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Appellee.
} No. 34425. Stipulation.

It is hereby stipulated and agreed between counsel for appellant and appellee as follows:

1. The appellee hereby enters its appearance to this appeal.

2. The case when allotted is to be heard on a day to be agreed on hereafter upon the transcript of the record in the county court, which is to have the same force and effect as if the original record was filed in this court on the appeal. This June 10, 1903.

H. L. STONE,
SAM'L B. KIRBY,
Attorneys for Appellant.
HUMPHREY, BURNETT & HUMPHREY,
FORCHT & FIELD,
Attorneys for Appellee.

134 At a court held on the 11th day of June, 1903:

Came parties by counsel and filed a stipulation herein.

And the appellee hereby enters its appearance to the appeal herein.

Said stipulation filed herein on the 11th day of June, 1903, is as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, First Division.

THE COMMONWEALTH OF KY., ETC., Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant. } Stipulation.

It is hereby stipulated and agreed between counsel for appellant and appellee as follows:

1. The appellee hereby enters its appearance to the appeal.

2. The case when allotted is to be heard on a day to be
135 agreed on hereafter upon the transcript of the record in the county court, which is to have the same force and effect as if the original record were filed in this court on the appeal. This June 10th, *1893*.

H. L. STONE,
SAMUEL B. KIRBY,
Attorneys for Appellant.
HUMPHREY, BURNETT & HUMPHREY,
FORCHT & FIELD,
Attorneys for Appellee.

At a court held on the 20th day of June, 1903:

This action was set at rules by the appellant on the 15th inst.

And on motion of appellee it is ordered that this action be and it is postponed to the 23rd inst.

At a court held on the 23rd day of June, 1903:

By agreement of parties, by counsel, it is ordered that this action be and it is postponed to July 2nd, 1903.

136 At a court held on the 2nd day of July, 1903:

Came parties, by counsel, and this action having been heard, it is ordered that this action be and it is hereby submitted.

At a court held on the 14th day of November, 1903:

The court being advised, it is ordered that the judgment of the Jefferson county court be, and it is hereby, affirmed, upon the original and also upon the cross-appeal, to which the plaintiff excepts.

At a court held November 21, 1903, the following judgment was entered:

137 Jefferson Circuit Court, Chancery Branch, First Division.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Defendant. } Judgment.

The court being advised, it is considered by the court as follows:

1. That the Union Refrigerator Transit Company was the owner of 2000 cars on September 15, 1897; of a like number on September 15, 1898; of a like number on September 15, 1899; of a like number on September 15, 1900.

2. Said cars and each of them were of the fair cash value at said several times of the sum of $200 each.

3. Said cars were employed by the defendant by renting them to divers and sundry shippers, who took possession of same from time to time, at Milwaukee, Wisconsin, and used them for the carriage of freight over divers and sundry railroads in the United States, Canada and Mexico, the defendant being paid by the railroads in accordance with the mileage made by said cars over their said lines.

138 4. That the correct method of ascertaining the number of said cars which should be assessed for taxation in Jefferson county, Kentucky, for each of said years, is to ascertain the amount of earnings made by any and all of said cars upon any line of railroad wholly or partly in the State of Kentucky; to apportion the earnings made on lines which are partly within and partly out of Kentucky, according to the mileage of such lines in and out of Kentucky, and by this means ascertain the gross earnings made by the defendant upon all its cars in Kentucky; then find the total amount of gross earnings made by the defendant, and divide these gross earnings by the total number of cars, to show the amount of gross earnings made by each car; then divide the total gross earnings in Kentucky by the gross earnings made by each car. Following this method, the court finds that there were subject to assessment in Jefferson county, Kentucky, as of

September 15, 1897	28 cars;
September 15, 1898	29 cars;
September 15, 1899	40 cars;
September 15, 1900	67 cars.

5. The court therefore finds that the proper assessment to be made against the defendant as of,

139 September 15, 1897, is	$5600
September 15, 1898	5800
September 15, 1899	8000
September 15, 1900	13400

6. It is adjudged by the court that the defendant owes State and county taxes upon the assessments for the said years as follows:

1898, $51.80; 1899, $37.58; 1900, $50.00; 1901, $102.51; and it is further adjudged that the defendant is liable for penalties as follows: 1898, $10.36; 1899, $7.50; 1900, $10.00; 1901, $20.50; and the county clerk is directed to enter said assessments, and to certify the same as directed by section 4241 of the Kentucky Statutes.

7. The court finds that the defendant is not liable for assessment for any years other than those mentioned herein.

8. The court finds that none of the cars of the defendant other than those herein mentioned are liable to assessment for any of said years. The judgment appealed from is affirmed by this court.

9. The defendant is given judgment for its costs expended on this appeal, for which it may have execution against the plaintiff.

To the foregoing judgment the plaintiff excepts, and prays
140 an appeal to the court of appeals, which is granted.

SHACKELFORD MILLER, Judge.

Have seen.
H. L. STONE,
Att'y for Pl'ff.

Nov. 21, 1903.

141 STATE OF KENTUCKY, }
County of Jefferson, } *sct:*

I, John H. Page, clerk of the Jefferson circuit court, in and for the county and State aforenamed, do hereby certify that the foregoing 140 pages contain a full, true and complete transcript of the record and proceedings in the case wherein The Commonwealth of Kentucky, *et al., is* plaintiff-, and The Union Refrigerator Company is defendant, 34425, an action lately pending in the aforesaid court, chancery branch, first division.

Witness, John H. Page, clerk of said court, this 15th day of December, 1903.

JOHN H. PAGE,
Clerk of the Jefferson Circuit Court,
By L. LEWIS MERRIWETHER,
Deputy Clerk.

142 With the foregoing transcript the appellant filed a statement in the office of the clerk of the court of appeals, in words and figures as follows, to-wit:

Court of Appeals of Kentucky, January Term, 1904.

COMMONWEALTH OF KENTUCKY, by WM. L. Weller, Jr., Revenue Agent for Jefferson County, Appellant,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Appellee.
} Statement of Appeal.

The above named are all the parties appellant and appellee.

The judgment appealed from was rendered by the Jefferson circuit court, chancery branch, first division, on November 21, 1903, and will be found on pages 137–140 of the transcript. The appeal was granted by the court below.

SAM'L B. KIRBY,
County Attorney,
H. L. STONE,
Attorneys for Appellant.

143 Be it remembered that on the 19th day of January, 1904, in the court of appeals of Kentucky, at the capitol at Frankfort, the following order was entered:

"COM'LTH, by, &c.,
v.
UNION REFRIGERATOR TRANSIT CO.
} Jefferson.

Comes parties by counsel and moves the court to docket, advance and set this case for oral argument at next April term of this court, which motion is submitted."

The motion mentioned in above order is as follows:

Court of Appeals of Kentucky.

COMMONWEALTH OF KENTUCKY, by, &c., Appellant,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Appellee.
} Motion.

The appellee desires that this case shall be assigned for argument at the April term. The questions involved are all important and of general interest.

The Commonwealth of Kentucky, through its revenue agent, made an application to the county court of Jefferson county, for the
144 assessment of the property of the Union Refrigerator Transit Company. It appears that this company is a corporation organized under the laws of the State of Kentucky. It owns about

2000 railroad cars. These cars it leases to various industries, and the compensation which it receives for the use of these cars comes from the railroads over which they run; these railroads paying the company a certain rate per mile. The cars go all over the United States.

It is insisted by the appellee that only a few of these cars ever come to Kentucky at all, and that the most of them are used on railroads outside of the State. It is insisted by the appellee that under the revenue system of the State of Kentucky only such proportion of these cars can be taxed in Kentucky as may be reached by either comparing the total mileage made by all of the cars with the mileage made by those which come into Kentucky, on its railroads, or by taking the total earnings of all the cars and comparing this with the total earnings made by the cars while moving through Kentucky.

It is insisted by appellee that this is the method of taxation followed with reference to other similar properties, and that to subject the Union Refrigerator Transit Company to a taxation upon
145 all of its cars would be an unjust and an unlawful discrimination and one which would be violative of the constitution of Kentucky and also of the fourteenth amendment to the Constitution of the United States.

It is further insisted by appellee that under the doctrines laid down by this court and also by the Supreme Court of the United States, the properties of similar corporations organized outside of the State of Kentucky are taxed in Kentucky according to the one or the other of the plans above set forth.

It is further insisted by the appellee that personal property, such as is owned by the appellee, has not a situs in Kentucky, and therefore cannot be taxed here, but that the situs of property of this character is determined by its user in the various jurisdictions where these cars actually are from time to time.

The county court of Jefferson county held that only such proportion of the cars of the appellee as answered to the proportion of gross earnings in Kentucky to the total gross earnings could be assessed in Kentucky. And this judgment was affirmed by the Jefferson circuit court, chancery branch, first division.

The appellee will insist upon the following propositions:

146 (1.) The situs of movable personal property capable of acquiring an actual situs and actually located elsewhere, is not at the domicile of the owner. Such personal property may be taxed by any jurisdiction in which it is found, and cannot be taxed in the jurisdiction in which it is not found.

(2.) The foundation of the State's right to tax property lies in the fact of the State's duty to protect that property. If property is located outside of a State it is protected and may be taxed by the sovereignty in which it is located and not elsewhere.

The legislature did not intend that such a corporation as the appellee and such property as it owns should be taxed under section

4020, and that section must be read in connection with sections 4077, 4079, 4080 and 4081.

Section 4020, in so far as it seeks to tax personalty out of the State, is unconstitutional, in that it violates the fourteenth amendment and the provisions of sections 172, 182 and 202 of the constitution of Kentucky, and section 171 of the constitution of Kentucky limiting taxation to property within the territorial limits.

The only method of taxing the property of the appellee is that which is applicable to similar corporations which employ property and do business in many States and which are therefore
147 taxed by ascertaining the proportion due to Kentucky either on the gross earnings rule or the mileage rule.

The appellee respectfully represents that these are important questions, and the case being one involving taxes, it is assumed that the court will desire to give it a speedy hearing. The appellant unites with the appellee in the request for an oral argument and that the case be assigned to some day in the April term.

Respectfully,

FORCHT & FIELD,
HUMPHREY, BURNETT & HUMPHREY,
Attorneys for Appellee.

The appellant, without consenting to the foregoing grounds and propositions, unites in the motion to advance and have this case set for an oral argument at the next April term of the court.

H. L. STONE,
Attorney for Appellant.

And afterwards on the 20th day of January, 1904, at a court of appeals at the capitol at Frankfort, the following order was entered:

148 COM'LTH OF KY., by, etc., v. UNION REFRIGERATOR TRANSIT CO. } Jefferson.

The court being sufficiently advised, it is considered that the motion for argument herein be sustained, and said case is set for oral argument on March 10th, 1904.

And afterwards on the 10th day of March, 1904, at a court of appeals held at the capitol at Frankfort, the following order was entered:

COM'LTH OF KY., by, etc., v. UNION REFRIGERATOR TRANSIT CO. } Jefferson.

Comes appellee by counsel and filed brief, and this case coming on to be heard, was argued by A. P. Humphrey for appellee and

Henry L. Stone for appellant, and submitted, with ten days' leave to each party to file briefs.

And afterwards on the 5th day of May, 1904, at a court of appeals held at the capitol at Frankfort, the following judgment was entered, to-wit:

149 COMMONWEALTH, by, etc., Appellant, vs. THE UNION REFRIGERATOR TRANSIT COMPANY, Appellee. } Appeal from Jefferson Circuit Court, Ch'y Branch, 1st Div.

The court being sufficiently advised, it seems to them that the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for further proceedings not inconsistent with the opinion herein, which is ordered certified to said court.

It is further considered that the appellant recover of the appellee his cost herein expended.

And on said date the court delivered the following opinion:

150 Court of Appeals of Kentucky.

May 5th, 1904 (to be Reported).

COMMONWEALTH, by, &c., Appellants, vs. UNION REFRIGERATOR TRANSIT COMPANY, Appellee. } Appeal from Jefferson Circuit Court, Chancery (1st) Div.

Opinion of the Court by Judge Barker.

The appellee, Union Refrigerator Transit Company, is a corporation organized under the laws of this Commonwealth, having its home office in Crescent Hill, Jefferson county, Kentucky, and its principal place of business in St. Louis, Missouri. It is the owner of two thousand refrigerator cars, which it leases out to various parties needing them for the preservation of their goods while in transit throughout the United States, Mexico and Canada. These cars are about the value of two hundred dollars each.

This proceeding was instituted by the auditor's agent of
151 Jefferson county under section 4241, Kentucky Statutes, for the purpose of forcing appellee to list its cars for State and county taxation; this was resisted by the appellee before the county court, with the result that a judgment was rendered requiring it to list such a proportion of its cars as under a system of averages were shown to be used in the State of Kentucky during the fiscal year; the remainder were held not to be subject to taxation here. From

this judgment, the Commonwealth appealed to the Jefferson circuit court, where the judgment of the county court was affirmed. To reverse these judgments this appeal is prosecuted.

There is no complaint in this record of a want of regularity in the proceedings; the question for adjudication being whether or not all of the cars owned by appellee, whether in or out of this State, are subject to taxation here. It is insisted by appellee that such of its cars as are used in foreign commerce are not subject to taxation in Kentucky under the language of the statute; and that, if they are so taxable, then the statute is void, because violative of the State constitution and of the fourteenth amendment of the Federal Constitution. Of these, in their order.

The following sections of the Kentucky Statutes are applicable to the subject in hand:

152 SECTION 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempt from taxation by the constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale.

SECTION 4022. For the purpose of taxation, real estate shall include all lands within this State and improvements thereon; and personal estate shall include every other species and character of property—that which is tangible as well as that which is intangible.

The slightest examination of these sections show- that they leave nothing for construction. Appellee being a corporation organized under the laws of this State, its personal property, whether tangible or intangible, and whether in or out of this State, must be taxed here by the terms of the law.

153 With the question of whether or not the modern tendency of legislative enactment and judicial construction is to trench upon the legal maxim *mobilia sequuntur personam* we have nothing to do; and it may be, therefore, freely conceded, for the purposes of this case, that all that is said in this regard by counsel for appellee is true. Our State upholds and enforces the ancient fiction in all its original severity; and we do not understand that it is open to us to destroy by construction the integrity of a statute, the words of which are so plain that "he who runs may read." And whatever may be said as to the judicial utterances of other jurisdictions, our court has uniformly held, that for the purpose of taxation the situs of personal property of every description is the domicil of the owner. The case of Wren *v.* Boske, sheriff, 24 K. L. R., 2nd part, page 1780, presented this state of facts: The appellant Wren resided in Scott county; he owned a farm in Kenton county, upon which he had horses, mules, cattle and sheep, which had been there for eight years. This personal property he listed with the assessor of

Scott county, where he resided, but, notwithstanding this, it was assessed for taxation in Kenton county, and he instituted an action to restrain the sheriff of Kenton county from selling it for taxes.

This court said:

154 "It is conceded that the stock had obtained a situs in Kenton county, and if personal property in this State which has obtained a situs in a county other than that of the owner's residence may be assessed in that county, although the owner gives it in for taxation in the county of his residence, then the judgment of the circuit court dismissing the plaintiff's petition is right.

"We are referred to a number of decisions holding that personal property of non-residents of the State, which has obtained a situs in the State, may, if the legislature so provides, be taxed in that State, and the same rule no doubt would apply between the different counties of the same State if the legislature so provided. But the question after all is one of legislative intent."

The court then held that the property could only be taxed at the domicil of the owner.

In the case of Langdon-Creasy Company *v.* Trustees of Owenton Common School District, &c., 25 K. L. R., part first, page 823, it appears that the corporation had its domicil in Covington, Kentucky; it also had a retail grocery store in Owen county, Kentucky, where its goods were sought to be taxed for local purposes. This

155 court held, approving Wren *v.* Boske, sheriff, that the personal property of the corporation was only taxable in the county of its residence.

It was said:

"As appellant corporation has a legal residence, and not being in the class of corporations which are required to report to the auditor, it must be assessed in the same manner as that of a natural person. It seems to us that there is no escape from this conclusion. The legislature has the unquestioned authority to fix the situs of property for the purpose of taxation. * * * The case of Wren *v.* Boske, is made to turn upon the legislative intent, and this case is likewise made so to turn."

In the case of Gates *v.* Barrett, 79 Ky., 295, it is said:

"In general, movable property is to be assessed for taxation at the place of the owner's residence."

See, also, Boske, sheriff, *v.* Security Trust & Safety Vault Company, 22 K. L. R., 181; Covington *v.* Wayne, 22 K. L. R., 826, and City of Louisville *v.* Shirley, 80 Ky., 71.

In Cooley on Taxation, 3rd edition, volume 1, page 86, the rule is stated:

156 "If a person is domiciled within the State, his personalty, in contemplation of law, has its situs there also, and he may be taxed in respect of it at the place of his domicil. * * * However, the maxim *mobilia sequuntur personam* is not of universal application, *does not rest on any constitutional foundation*, and gives way

before express laws; and a State may, at its option, impose taxes on tangible personal property within its limits irrespective of the residence or allegiance of the owner, although this would not be true of property merely passing through the State and not having a situs therein."

Id., 673: "The proper place for the taxation of a corporation in respect of its personalty is the place of its principal office, *unless some other rule is prescribed by statute.*"

In Burroughs on Taxation, page 186, the rule is thus stated: "A corporation is taxable for its personal property at its domicil, which is the State of its creation, and within that State, in the town where it has its principal office or place of business."

In the Am. & Eng. Encycl. of Law, first edition, volume 25, page 133, it is said:

157 "In the taxation of personal property, two inconsistent doctrines often come into conflict, the one *mobilia sequuntur personam*, demanding that the property shall be taxed at the owner's domicil on the theory that personality has no other situs; the other, that it should be taxed like real property, where it is situated. Ordinarily the first rule will prevail, and, as a general rule, personal property is taxable at the domicil of its owner. This is often so provided by statute. The State may, however, and often does, make it taxable at its actual situs. The fact that double taxation may result from the assessment in two States does not affect the validity of the assessment."

It is urged, however, that the statute which requires movable personable property, situated in a different jurisdiction, to be taxed at the domicil of the owner, is invalid as being in contravention of the provisions of section 171 of the constitution, which is as follows:

"The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes
158 shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

It is said that the language "they shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax" limits the power of taxation to property actually within the territorial limits of the taxing jurisdiction. This, we think, is erroneous. The subject matter of the language in question is uniformity. There is no attempt to enumerate the subjects of taxation. Nor can the language be read as if it was said that taxes shall be uniform upon all property within the territorial limits of the authority levying the tax. The language is, that taxes shall be "uniform upon all property subject to taxation," leaving the question as to what property is subject to taxation undetermined. Section 172, however, does provide what property shall be taxed; it is as follows: "All property, not exempted from taxation by this con-

stitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; * * *."

This language needs no construction, and it requires that all
159 property of which the State has jurisdiction, except that which is exempted, shall be taxed; and, instead of limiting the subjects of taxation to personal property having an actual situs within the territorial limits, the section extends the zone of taxation, until it equals that of jurisdiction.

Nor can it be maintained that the statute is invalid for the reason that it denies to the owners of such personal property "the equal protection of the laws." This precise question arose in the case of Coe *v.* Errol, 116 U. S. Rep., 524. There the question was, whether certain logs, which were situated within one State, could be taxed therein, when they were also taxed in the State where the owner resided. And it was said by the court:

"We have no difficulty in disposing of the last condition of the question, namely, the fact (if it be a fact) that the property was owned by persons residing in another State; for, if not exempt from taxation for other reasons, it cannot be exempted by reason of being owned by non-residents of the State. We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong
160 to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the Government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary. The fact, therefore, that the owners of the logs in question were taxed for their value in Maine as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case, and may be laid out of view."

In the case of Blackstone *v.* Miller, 188 U. S. Rep., 202, the question for adjudication was, whether a law which taxed the succession to a tangible chattel at the situs of the chattel was valid, when it appeared that the same subject was taxed at the domicil of the owner. The court said:

"To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of suc-
161 cession from the law of the domicil, or that by the law of the domicil the chattel is a part of a *universitas* and is taken into account again in the succession tax there. * * *

"No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the

other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicil governs the whole. But these inconsistencies infringe no rule of constitutional law."

In the case of Kidd *v.* Alabama, *Id.*, 730, the question was, whether or not the fiscal laws of Alabama, which undertook to tax shares of stock in railroads held by residents of the State (the railroads being situated in other States), were inimical to the fourteenth amendment of the Constitution of the United States. In answering the argument that they were invalid, the court said:

"We say that the State in taxing stock may take into account the fact that the property and franchises of the corporation are
162 untaxed, whereas in other cases they are taxed; and we say untaxed because they are not taxed by the State in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the State of Alabama is not concerned. No doubt it would be a great advantage to the country, and to the individual States, if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far. * * * The State of Alabama is not bound to make its laws harmonize in principle with those of other States. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all."

These opinions of the Supreme Court of the United States not only clearly recognize the right of the State to enforce the maxim *mobilia sequunter personam* in fiscal matters in its original vigor, but they clearly deny that, in so doing, it contravenes the provisions of the fourteenth amendment of the Constitution of the United States.

It is said that the fact that all of appellee's cars are taxed
163 whether in this State or not, while in assessing the property of railroads the cars in use out of the State are omitted, is an unjust discrimination against it, and is violative of the fourteenth amendment as to the "equal protection" of the laws. Railroad corporations occupy an unique position in our fiscal system. They are, by the express language of the Constitution, taken out of the category of other property as to the manner in which they are taxed; but, in so doing, it is not intended to violate the fundamental principle of the Constitution as to uniformity in taxation, but on the contrary, to enforce and secure it; and it is confidently believed that the system devised does accomplish the end desired as nearly as may be. We will not burden this opinion with any attempt to show the reasons for the distinction in the fiscal law as to railroads, nor the fact that they are not unduly favored in their isolation; these are obvious, and this court has uniformly upheld the validity of the statutes which provide and enforce the anomalous mode of taxation applicable to them. Kidd *v.* Adams, *supra*, and the Kentucky Rail-

road Tax cases, 115 U. S. Rep., 321, are conclusive of the Federal question.

For the reasons indicated, the judgment is reversed for proceedings consistent with this opinion.

164 And afterwards on the 7th day of June, 1904, at a court of appeals at the capitol at Frankfort, the following order was entered, to-wit:

COM'LTH, by, etc.,
v.
UNION REFRIGERATOR TRANSIT COMPANY. } Jefferson.

Comes appellee by counsel and filed a petition, and moved the court to grant a rehearing and for a modification of the opinion delivered herein, which motion is submitted.

The motion and petition mentioned in said above order is as follows:

Court of Appeals of Kentucky, January Term, 1904.

COMMONWEALTH OF KENTUCKY, by W. L. Weller, Auditor's Agent, Appellant,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Appellee. } Petition for Rehearing or Modification.

We respectfully submit that the court has not, in its opinion, answered the proposition that to tax property not having any
165 situs in Kentucky but having an actual situs elsewhere is to give to the laws of Kentucky an extra territorial operation, and that this is in conflict with the fourteenth amendment to the Constitution of the United States.

We submit that the case of Louisville & Jeffersonville Ferry Company *v.* Kentucky, 188 U. S., 399, is an authority directly in point. It is true that the property there was an incorporeal hereditament, but we submit that there is no distinction between real estate and tangible personal property as to the capacity for actual situs.

As we understand the opinion, the court holds that the appellee was to be taxed upon the cars owned by it at the several dates of assessment, without regard to whether such cars were, on those dates, *on or* any day in the year, actually within the State of Kentucky, and notwithstanding the fact that they were, during the whole period actually outside of the State of Kentucky. If the court is still of this opinion, as we desire to prosecute a writ of error to the Supreme Court of the United States, it would seem that time would be gained by this court making a specific direction as to the judgment to be entered by the Jefferson county court.

Under section 4241 of the Kentucky Statutes it is provided that an appeal shall be had simply upon the question as to whether the property is liable for assessment. It belongs to the county
166 court to fix a value if the property is so liable. The county court, in its judgment, has found that the appellee owned, on September 15, 1897, 2000 cars, and a like number on September 15, 1898, 1899 and 1900, and that these cars were each of them, at the said several dates, of the fair cash value or sum of $200. It would seem, therefore, that a proper direction to the lower court by this court would be to assess the defendant as of September 15, 1897, for $400,000, and the same amount as of September 15, 1898, 1899 and 1900, and to fix the State and county taxes for the several years upon this basis.

The court, we presume, agrees with the lower court in holding that the appellee was not liable under this proceeding for any of the years mentioned in the statement of the Commonwealth other than the four above given.

We respectfully ask, therefore, for a rehearing in this case, and that the judgment be affirmed, or, failing that, that the court will specifically adjudge that the appellee is not liable except for the four years above mentioned, and will specifically adjudge the amount of the assessment which should be made against it for these four years.

Respectfully,

HUMPHREY, BURNETT & HUMPHREY,
FORCHT & FIELD,
Attorneys for Appellee.

167 And afterwards on the 10th day of June, 1904, at a court of appeals at the capitol at Frankfort, the following order was entered, to-wit:

COM'LTH, by, etc.,
v.
UNION REFRIGERATOR TRANSIT COMPANY. } Jefferson.

Comes appellant by counsel and files a response to appellee's petition for rehearing and modification of opinion.

Said response is as follows:

Court of Appeals of Kentucky, January Term, 1904.

COMMONWEALTH OF KENTUCKY, by WM. L. Weller, Jr., Revenue Agent for Jefferson County, Appellant,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Appellee. } Response to Petition for Rehearing or Modification.

At the outset of the petition for re-hearing it is stated that the court has not answered the proposition that to tax property not hav-

ing any situs in Kentucky, but having an actual situs elsewhere, is to give to the laws of Kentucky an extra territorial operation,
168 and that this is in conflict with the fourteenth amendment to the Constitution of the United States. Now, the proposition has no application to the facts in this case, for all of the tangible personal property of the appellee has in fact a situs in Kentucky, under the laws of this State, and it was not shown by the record that such property has an actual situs elsewhere, being used in such manner as not to acquire a permanent situs elsewhere; but even if it did by the manner in which it is used by appellee acquire such a situs elsewhere, and thereby be subject to taxation under the laws of other States, this fact does not deprive the State of Kentucky of the power to tax such property at the domicile of the owner, where the laws of this State fix the situs for taxation in this State. The laws of this State, in that respect, as clearly held in the opinion, do not conflict with the fourteenth amendment to the Constitution of the United States.

Appellee's counsel further submit that the case of Louisville & Jeffersonville Ferry Company *v.* Kentucky, 188 U. S., 399, is an authority directly in point. I have heretofore discussed in my original brief that case and endeavored to show it had no application to the facts in the present case. (See original brief, pp. 23–24) The request that the court specifically direct on the return of
169 the case to the court below that the latter court shall direct the county court to fix the value of the property liable, and the number of cars for each of the four years involved on this appeal, is not objected to. On the contrary, we think it entirely proper. There is no controversy about the number of cars, or the value of each car, or the number of years in which they are taxable for State and county taxes. That is to say, the record shows conclusively that the appellee's cars numbered 2,000, that the value of each was $200, on each of the dates of the four years for which taxes are sought to be collected, to-wit: September 15, 1897, September 15, 1898, September 15, 1899, and September 15, 1900, for the years 1898, 1899, 1900 and 1901; and the tax rates are shown by the record both for the State and county in each of said years. A modification or extension of the opinion as suggested is deemed entirely proper.

All of which is respectfully submitted,

H. L. STONE,
Attorney for Appellant.

170 And afterwards on the 16th day of June, 1904, at a court of appeals held at the capitol at Frankfort, the following order was entered:

COM'LTH, by, etc.,
v.
UNION REFRIGERATOR TRANSIT COMPANY. } Jefferson.

The court being sufficiently advised, it is considered that appellee's motion and petition for rehearing and modification of opinion be and the same is hereby overruled (response delivered).

And on said date the court delivered the following response to appellee's motion and petition for rehearing and modification of opinion:

Court of Appeals of Kentucky, June 16th, 1904.

COMMONWEALTH OF KY., by, etc., Appellants,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Appellee. } Appeal from Jefferson Circuit Court, Ch'y (1st) Div.

Response to Petition for Rehearing by Judge Barker.

As the record shows, without contradiction, that appellee
171 owned two thousand cars of the value of two hundred dollars each on the assessment day of each year in which they are sought to be taxed by this proceeding, the opinion is extended so as to require the lower court, upon the return of the case, to enter a judgment against appellee for the amounts due upon the above-named property for taxes for the respective years, at the legal rate of taxation for each year, with legal penalties.

The petition for re-hearing is overruled.

Be it remembered that on the 16th day of June, 1904, there was filed in the office of the clerk of the court of appeals, in the case styled The Commonwealth of Ky., by, etc. *v.* The Union Refrigerator Transit Company, an assignment of errors, which is hereto attached and is as follows:

172 Supreme Court of the United States.

UNION REFRIGERATOR TRANSIT COMPANY, Pl'ff in Error,
vs.
COMMONWEALTH OF KENTUCKY, by W. L. Weller, Jr., Revenue Agent, Def't in Error. } Assignment of Errors.

The plaintiff in error assigns the following errors committed to its prejudice by the court of appeals of Kentucky in its judgment in

the case lately pending in said court wherein the defendant in error was appellant & plaintiff in error was appellee viz.

1. The court erred in holding that property of plaintiff in error not having a situs in Kentucky & having a situs elsewhere was subject to taxation or assessment for taxation by the Commonwealth of Kentucky

2. The court erred in holding that such property was so liable to taxation or assessment for taxation by Kentucky when to do so gives the laws of Kentucky an extraterritorial application & force & deprives plaintiff in error of its property without due process of law, contrary to the Constitution of the United States & the fourteenth amendment thereof

173 3. The court erred in holding that such property was so liable to taxation or assessment for taxation when to do so denies to plaintiff in error the equal protection of the law contrary to the Constitution of the United States & the fourteenth amendment thereof

4. The court erred in holding that such property was so liable to taxation or assessment for taxation when to do so discriminates against the plaintiff in error, & denies to it the equal protection of the laws contrary to the Constitution of the United States & the fourteenth amendment thereof—

5. The court erred in that its judgment gave effect to the revenue laws of the Commonwealth of Kentucky violative of the Constitution of the United States as amended

W. H. FIELD,
ALEX. P. HUMPHREY,
For Pl'ff in Error.

[Endorsed :] Filed Jun- 16 1904 J. Morgan Chinn, C. C. A.

174 And that on said date, there was filed in the clerk's office of the court of appeals of Kentucky, in the above styled case, the original writ of error, and the allowance of the writ thereon endorsed, and which original writ of error is hereto annexed, with the endorsement thereon allowing the writ, and which is as follows:

175 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the court of appeals of the Commonwealth of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the Commonwealth of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between the Commonwealth of Kentucky, by W. L. Weller, Jr., revenue agent, and Union Refrigerator Tran-

sit Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised *there*under, the United States, and the decision was against their validity; or wherein was drawn in question the valifity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Union Refrigerator Transit Company, as by its complaint appears, we beinng willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with
176 all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on or before thirty days from this date, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 16th day of June, A. D. 1904.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
Clerk of the United States Circuit Court for the
Eastern District of Kentucky, at Frankfort.

Allowed by—
A. R. BURNAM,
Chief Justice of the Court of Appeals
of the Commonwealth of Kentucky.

[Endorsed:] Filed Jun- 16 1904 J. Morgan Chinn, C. C. A.

177 And that on the 20th day of June, 1904, there was filed in the office of the clerk of the court of appeals of Kentucky, in the above styled case, *there was filed* the original citation, with proof of service endorsed thereon, and which original citation and proof of service thereon is hereto annexed, and is as follows:

178 THE UNITED STATES OF AMERICA, ss:

To the Commonwealth of Kentucky, by W. L. Weller, Jr., revenue agent, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, thirty days from this date, pursuant to a writ of error filed in the clerk's office of the court of appeals of Kentucky, wherein Union Refrigerator Transit Company is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this the 16th day of June, A. D. 1904.

A. R. BURNAM,
Chief Justice of the Court of Appeals of Kentucky.

Accepted for Commonwealth of Kentucky, defendant in error, this June 18, 1904.

HENRY L. STONE, Attorney.

[Endorsed:] Filed Jun- 20 1904 J. Morgan Chinn, C. C. A.

179 And that on the 16th day of June, 1904, there was filed in the office of the clerk of the court of appeals of Kentucky, the writ of error bond, and which is in words and figures as follows:

Court of Appeals of the Commonwealth of Kentucky.

COMMONWEALTH OF KENTUCKY, by W. L. Weller, Jr., Revenue Agent, Appellant,
vs.
UNION REFRIGERATOR TRANSIT COMPANY, Appellee.
} Bond on Writ of Error.

Know all men by these presents: that we, Union Refrigerator Transit Company, as principal, and American Bonding Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the appellant, Commonwealth of Kentucky, by W. L. Weller, Jr., revenue agent, in the just and full sum of fifteen thousand dollars ($15,000.00), to be paid to the said appellant, its attorneys or assigns; to which payment, well and truly to be made, we *bond* ourselves, our successors and assigns, jointly and severally, by these presents.

180 Sealed with our seals, and dated this the 16th day of June, A. D. 1904.

Whereas, lately in the court of appeals of the Commonwealth of Kentucky, in a suit therein depending, between Commonwealth of Kentucky, by W. L. Weller, Jr., revenue agent, appellant, and Union Refrigerator Transit Company, appellee, a judgment was rendered against the said Union Refrigerator Transit Company, and the said appellee has obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit; and a citation directed to the said Commonwealth of Kentucky, by W. L. Weller, Jr., revenue agent, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden in the city of Washington on or before thirty days from the date hereinabove written:

Now, the condition of the above obligation is such, that if the said Union Refrigerator Transit Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make said plea good, then the above obligation to be void, else to remain in full force and virtue.

UNION REFRIGERATOR TRANSIT CO.,
By S. P. VICKROY, Vice-Pres.
AMERICAN BONDING CO. OF BALTIMORE,
Per ALEXANDER P. HUMPHREY AND
WM. H. FIELD.

181 Signed, sealed and delivered in the presence of—
W. B. O'CONNELL,
Deputy Cl'k Court Appeals.

Approved by
A. R. BURNAM,
Chief Justice of the Court of Appeals of Kentucky.

And there was filed with said writ of error bond a power of attorney from American Bonding Company of Baltimore to Alexander P. Humphrey and William H. Field, and which is in words and figures as follows:

Power of Attorney from American Bonding Company of Baltimore to Alexander P. Humphrey or William H. Field.

Know all men by these presents, that American Bonding Company of Baltimore, a corporation created by and existing under the laws of the State of Maryland, of the city of Baltimore, Maryland, and duly authorized to act as sole surety in the State of Kentucky, has made, constituted, and appointed, and by these presents
182 doth make, constitute and appoint Alexander P. Humphrey or William H. Field, its true and lawful attorney for and on behalf of the said corporation as surety, to make, sign, & acknowledge a bond in such form as is prescribed by the statutes of the United States, to be executed by Union Refrigerator Transit Company as principal, conditioned for the prosecution of an appeal by

the Union Refrigerator Transit Company, from a judgment of the court of appeals of Kentucky, to the Supreme Court of the United States, hereby approving, ratifying and confirming all that its said attorney may do or lawfully cause to be done in the premises by virtue of these presents.

In testimony whereof American Bonding Company of Baltimore has caused these presents to be signed by Samuel H. Shriver, vice president of said company, and its corporate seal to be hereunto affixed, this the thirteenth day of June, 1904.

AMERICAN BONDING COMPANY
OF BALTIMORE,
By SAMUEL H. SHRIVER,
Vice President.

Attest: EDWIN W. POE, Secretary.

STATE OF MARYLAND, }
City of Baltimore, } ss:

On this 14th day of June, A. D. 1904, before me, Millard Leonard, the subscriber, a notary public for the State of Mary-
183 land, duly appointed to take proof and acknowledgement of deeds, and other instruments, came Samuel H. Shriver, vice president, and Edwin W. Poe, secretary, of the American Bonding Company of Baltimore, to me personally known to be the individuals described in and who executed the preceding instrument, and they each duly acknowledge the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal at the city of Baltimore the day and year first above written.

[Seal of Millard Leonard, Notary Public, of Baltimore City.]

MILLARD LEONARD,
Notary Public.

184 COMMONWEALTH OF KENTUCKY, }
Court of Appeals. }

I, J. Morgan Chinn, clerk of the court of appeals of the Commonwealth of Kentucky, do hereby certify that the foregoing 183 pages contain a full, true and complete copy of the transcripts of the records and proceedings had in the court of appeals of the Commonwealth of Kentucky, including the opinion of said court, in the action of

COMMONWEALTH OF KENTUCKY, by WILLIAM L. WELLER, Revenue Agent, Appellant,
vs.
THE UNION REFRIGERATOR TRANSIT CO., Appellee,

as full and complete as the same remain on file and of record in my office, which transcript I herewith transmit in pursuance of the command of the writ of error thereto attached. I also certify that the original assignment of errors, the original writ of error, a copy of the writ of error bond, the order allowing the writ of error, and approving the bond, and the original citation with proof of service thereof, and a copy of the power of attorney from the American Bonding Company of Baltimore to Alexander P. Humphrey and William H. Field, are hereto attached, and herewith returned.

185

In testimony whereof, I have hereunto set my hand and affixed the seal of said court.

Done at the capitol, at Frankfort, Ky., this, the 23rd day of June, 1904.

[Seal Kentucky Court of Appeals.]

J. MORGAN CHINN,
Clerk of the Court of Appeals of the
Commonwealth of Kentucky.

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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 84.

Union Refrigerator Transit Company, Plaintiff in Error

vs.

Commonwealth of Kentucky by W. L. Weller, Jr., Revenue Agent, Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

In this case the Union Refrigerator Transit Company seeks a reversal of a judgment against it in favor of the Commonwealth of Kentucky in the Court of Appeals, which is the tribunal of final resort in that State. (R. 67-76).

STATEMENT.

It is our endeavor to point out exactly what are the questions here involved in this case, eliminating all matters of controversy dependent upon the laws of the State of Kentucky not involving federal questions.

This is a proceedng by the Commonwealth of Kentucky on relation of a revenue agent (sometimes called Auditor's Agent) for the purpose of retrospectively assessing the property of the Refrigerator Company for

taxation. The Refrigerator Company is a corporation organized under the laws of the State of Kentucky. Its articles of association are contained in the record (R. 53-57). The proceeding is taken under Section 4241, Kentucky Statutes (App.). This section provides that it shall be the duty of the sheriff or auditor's agent to cause to be listed for taxation all property omitted by any of the various assessing officers of the State. The agent proposing to have the property assessed files in the clerk's office of the county in which the property may be liable to assessment a statement containing the description and value of the property and the year or years for which the property is proposed to be assessed. Upon this statement a summons is issued and the case proceeds as an ordinary civil proceeding, the defendant answering and the plaintiff replying to affirmative allegations in the answer. Belknap vs. Commonwealth, 85, S. W., 693. If it appears that the property is liable to taxation and has not been assessed the Court is required to enter an order fixing the value therof at its fair cash value estimated as is required by law. If not liable, the Court makes an order to that effect. From so much of the order of the Court deciding whether or not the property is liable to assessment either party may appeal as in other civil cases. The appeal goes from the County Court to the Circuit Court and thence to the Court of Appeals.

It is to be noted that the only matter of appeal is the decision of the County Court "whether or not the property is liable to assessment." The value of the property fixed by the County Judge is not subject to appeal, he acting as an assessing officer.

In this case the statement of the revenue agent claimed a failure to assess as of September 15 (that being the assessment day in Kentucky) for the years 1890 to 1901, inclusive. All of these years, however, have been eliminated from the controversy except 1897, 1898, 1899 and 1900.

The answer of the Refrigerator Company (R. 7) contained various paragraphs, some raising State questions; others State and federal questions.

It appears from the pleadings and evidence that the Refrigerator Company, on the 15th day of September of

each of the years in controversy was the owner of 2,000 cars. While under its articles of incorporation its principal place of business was stated as being in Kentucky—originally Louisville, Jefferson County, Kentucky, (R. 53); then by amendment, Crescent Hill, Jefferson County, Kentucky (R. 56)—it rented its cars to various shippers who took possession of them from time to time at Milwaukee, Wisconsin, to use them for the carriage of perishable freight over practically all the railroads of the United States, Canada and Mexico, the company being paid by the railroads in accordance with the mileage made by the cars on their respective lines (R. 62). None of these cars were ever within the State of Kentucky except as they chanced to pass through it over the railroad by which they were routed to their respective destinations. The company's repair shops were at Milwaukee, Wisconsin. Its office was in St. Louis, Missouri, to which returns were made by the railroad and where its books were kept and its business conducted.

Section 4020, Kentucky, Statutes, provides as follows:

> "All real and personal estate within this State "and all personal estate of persons residing in this State, and of all corporations organized under the "laws of this State, whether the property be in or "out of this State . . . . shall be subject to taxa- "tion unless the same be exempt from taxation by "the Constitution, and shall be assessed at its fair "cash value estimated at the price it would bring "at a fair, voluntary sale."

Section 4096, in providing for the return of railroad property for assessment, enacts that if any of said railroad companies own or operate a railroad or railroads out of this State the president or chief officer of such company shall annually be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad in this State bears to the whole number of miles operated by said company in and out of this State.

The following is the opinion delivered by the County Judge upon the two federal questions which we have above suggested:

"The main question upon the submission is, the "determination of the effect to be given Sec. 4020, "Kentucky Statutes, and to what extent, if at all, "it violates the provisions of either the State or "Federal Constitution. Able and elaborate briefs "citing numerous authorities have been submitted "upon both sides, but no case precisely applicable "is cited on either side, though many of the cases "furnish helpful sidelights.

"The avowed and unchanging purpose of tax "legislation, throughout the ages, has been, and "still is, the attainment of equality and justice in "the distribution of the burden of maintaining "government, and while this has assuredly not "been fully attained, gratifying progress has at- "tended the long, earnest and sincere struggle, and "a reasonably fair approximation has been "reached. The achievement of this purpose in- "volves no less avoidance of taxing one piece or "class too low, of avoiding double taxation on the "one hand, and failure to tax at all, upon the "other.

"Certain it is that the best thought of our last con- "stitutional convention addressed itself to this "task with an earnestness and sincerity of purpose "to give to the people of Kentucky the most just "and equitable system of taxation within its "power, that admits of no sort of doubt.

"Much that is contended for on both sides of "this case is undoubtedly established by authority "beyond question. That movable personalty, "such as cars of refrigerator, palace and chair "cars, can, and do, acquire a taxable situs in other "States, than those of their owners' residence, is "settled conclusively by the cases of Pullman vs. "Penn., 141 U. S., 22; Am. Refrig. Transit Co. vs. "Colorado, 174 U. S., 170; Union Refrig. Transit "Co. vs. Utah, 177 U. S., 149, and numerous other "cases. There is eminent, though not so sound or "satisfactory, authority for the contention that

"any State in the exercise of its sovereignty may "tax all personalty of its citizens of whatever "nature, wherever situated, and without regard "to whether or not it has a taxable situs, or pays "taxes elsewhere. Judson on Taxation, Secs. 421, "422 and 423, and authorities there cited.

"Here, we are to consider not only the power of "the State to levy such tax, but also to inquire "whether or not such is its purpose, and if such "purpose is evidenced by its statutes, whether or "not it is in any way restrained by its constitution.

"A literal interpretation of Sec. 4020 unques- "tionably sustains plaintiff's contention, but such "a constitution is so abhorrent to principles of "justice and equality, so inconsistent, and so far "at variance with what this Court conceives to be "the cardinal aim and purpose of the fundamental "laws of the State, that it is extremely slow to ac- "cept such a view as correct. When we consider "that our Legislature exercises its power to tax "movable personalty of non-residents, to the ex- "tent that it has acquired a taxable situs in Ken- "tucky, and we attribute to it a purpose to be "fair and just, we cannot possibly reconcile such "action with an intention to tax movable per- "sonalty of residents of this State which is not "protected by the law of this State, is in no sense "a burden to this State, which is protected by laws "of other States, and pays taxes to such States.

"The doctrine of '*mobilia personam sequuntur*' "offers absolutely no justification for such a levy. "The Supreme Court of the United States has re- "peatedly declared that doctrine antiquated and "inapplicable to such a state of case. Union "Refrig. Transit Company vs. Utah, 177 U. S., "149; Commonwealth of Kentucky vs. Louisville "and Jeffersonville Bridge Company, decided "February 23rd, 1903, and 184 U. S.

"To attribute consistency and common fairness "to the Legislature, this section should be in- "terpreted to include all personalty of a resident "of Kentucky, wherever situated, to the extent it

"had not acquired (what under the laws of Ken-
"tucky applicable to personalty of non-residents,
"would be), a taxable situs elsewhere. The tax-
"payer was not to be allowed to escape taxation
"on personalty properly taxable here, on the
"ground that on the 15th of September, it was
"out of the State, and at the same time, escape
"taxation in the State where it was then located
"on the ground that it was a resident of Ken-
"tucky, and that his personalty was protected by
"the law of Kentucky, and not taxable elsewhere.

"As the State will not tolerate such a subterfuge,
"and such inconsistency on the part of a tax-payer,
"it ought not be expected to be guilty of just as
"gross an inconsistency, by taxing the personalty
"of a non-resident, because it has no actual situs
"here, and at the same time, refuse to credit the
"personalty assessment of a resident, upon which
"he pays taxes elsewhere.

"If the State be wilfully guilty of such gross in-
"justice and inexcusable inconsistency, its attitude
"is worse than that of the 'bandit with a pistol at
"the throat of every property owner,' so scath-
"ingly denounced by the Supreme Court of Penn-
"sylvania in Commonwealth vs. D. L. & W. R. R.
"Co., 145 Pa. St., 96. Such a system is indefensible
"in morals, and, if put into effective operation,
"would, as stated by the Supreme Court of Penn-
"sylvania in the case just cited, result in confisca-
"tion of the class of property now in question. The
"Court does not assert the foregoing views as the
"doubt, but suggests them as some of the reasons
"why we should be slow to accept the literal in-
"terpretation, contended for by counsel for plain-
"tiff.

"The Court is of opinion, that the merits of this
"branch of the controversy are effectively dis-
"posed of by the provisions of both the State and
"Federal constitutions, so that the correct inter-
"pretation of Sec. 4020 is not material in disposing
"of this case.

"While the Court cannot accept the construction

"of Sec. 171 of the Kentucky Constitution, which "limits the power to tax property actually within "the territorial limits of the power levying the "tax, and while it is entirely clear that the prop- "erty may be 'subject to taxation' within such ter- "ritorial limits without being actually therein, the "Court recognizes as the cardinal principle, "enunciated by that section, an imperative edict "for the establishment and maintenance of uni- "formity and equality in each branch of the State "and local government, in the distribution of the "burden of taxation. This limitation upon the "taxing power not only denies the right to fix dif- "ferent rates for different pieces or classes of "property, but just as effectively and emphatically "prohibited a different basis of valuation for one, "than that employed for the other, or the taxation "of one in whole and the other in part. A uniform "tax rate does not secure iniformity of taxation, "where one class of property pays upon a valua- "tion equal to 100 per cent. of its actual value and "another class upon 50 per cent. of such valuation, "or when one class of individuals is assessed for "all and another for half of its property. A tax "rate of fifty cents upon the one and twenty-five "cents upon the other, would secure precisely the "same degree of uniformity, and would be equally "defensible. To tax the entire rolling stock of "the defendant under Sec. 4020, notwithstanding "only a small portion of it has an actual situs in "Kentucky, and to tax similar property with pre- "cisely the same situs used in the same way and "for the same purpose according to the mileage "rule under Sec. 4096, merely because it is the "property of a railroad, does violence to every "idea or sentiment of uniformity, equality and "justice. Such a policy, carried out on a broad "scale, would breed anarchy and incite revolution.

"Sec. 182 of the Constitution and the interpre- "tation placed upon it by the Supreme Court in "the Kentucky railroad cases, 115 U. S. 321, as "this Court understands them, do not in any sense

"justify such gross inequality. Sec. 182 recogniz-
"ing the peculiar difficulties to be incurred in ar-
"riving at the value of railroads and railroad
"property, and in the collection of taxes dis-
"tributed over so much territority and throughout
"so many local taxing districts, relaxed the rule
"of uniformity as to the manner or method of
"assessment and collection of taxes, and no
"further. It cannot, for an instant, be contended
"that it authorized a different rate or a different
"standard of valuation, and with no more force
"can it be contended that the property of a rail-
"road was to be exempt from taxation, where the
"property of an individual or other corporation
"of a similar nature and similarly situated was to
"be taxed.

"The contention of counsel for plaintiff would
"justify the imposition of taxes upon every par-
"ticle of defendant's rolling stock, if on the 15th
"of September it should become the owner of all
"the rolling stock of the Louisville and Nashville
"railroad, and likewise, require the exemption of
"it according to the mileage rule, required in Sec.
"4096, if on that day said railroad should buy out
"the defendant, notwithstanding the fact that in
"neither case the nature, use or situs of any of the
"property was altered in the slightest. Sec. 182
"expressly recognized the justice of the then ex-
"isting law, taxing the rolling stock on the
"mileage basis by continuing that law in force.
"Taking this section with 171, a rational, fair, just
"and uniform system of taxation is proclaimed,
"that cannot possibly be tortured into a scheme
"to work the oppressive exactions and gross dis-
"criminations against such companies as defend-
"ant, that would result from the taxation of one
"under Sec. 4020 and the other under 4096.

"It will be observed that Sec. 182 of the Con-
'stitution applies not only to railroad, but also to
"'railroad property.' 'Railroad property' does
"not necessarily mean property belonging to a
"railroad. The term is just as applicable to prop-

"erty used in connection with railroads, and for "railroad purposes. Defendant's rolling stock "and that of numerous corporations which are "not railroad companies, is none the less 'railroad "property.'

"While the Legislature has not extended to com- "panies, other than railroad corporations, the "benefit of the equitable basis of assessments pro- "vided for by Sec. 182, uniformity and equality "of taxation imperatively require that they should "be done, and to the extent that defendant has de- "nied this benefit, the act, in the opinion of this "Court, is unconstitutional, as being violative of "Secs. 171 and 182 of the Constitution of Ken- "tucky, and also as denying to such company 'the "equal protection of the laws' required by Sec. 1 "of the fourteenth amendment to the Constitution "of the United States. To tax defendant's prop- "erty which has no situs in this State, in addition "to that which has such situs, is to impose upon "this class of property a greater burden than "that required to be borne by another species "of taxable property, to-wit: the franchises of "various corporations taxable in proportion to "gross earnings in and out of this State under "Secs. 4079 and 4080 and by mileage system under "Sec. 4081. This tax, it will be seen from those "sections, is imposed alike upon both residents "and non-residents. It is difficult to see upon what "theory of justice, equality or uniformity, the "State exacts tax upon the tangible property of "its citizens, which is located elsewhere and not "protected by its laws, and exempts tangible prop- "erty (no less valuable and receiving precisely the "same protection), in proportion to gross earnings "or mileage, out of this State. Under Secs. 174 "and 181 of the Constitution of Kentucky, pre- "cisely the same power to tax franchises, as "tangible property is conferred and that power "having been exercised, it is imperative, that "equality and uniformity should be observed.

"Counsel for defendant cite numerous authori-

"ties upon the proper interpretation of provisions
" 'within the territorial limits,' 'within the city,'
"&c. These authorities are not regarded as es-
"pecially helpful in this case as the statuory pro-
"vision, Sec. 4020, expressly transcends all ter-
"ritorial limits, and the provision of the Con-
"stitution Sec. 171 limits its operation not to
"property within the territorial limits of the tax-
"ing power, but to property 'subject to taxation'
"within such limits. The case of Commonwealth
"vs. The American Dredging Co., 1 L. R. A., 238,
"is somewhat similar to the case at bar, and while
"not interpreting precisely the same constitu-
"tional or statutory provisions, it forcibly
"enunciated a sound and correct principle for the
"taxation of property under very similar circum-
"stances. The Court here says:

" 'This rule (that of situs of personalty follow-
" 'ing domicile of its owner) is doubtless true of
" 'intangible property, such as bonds, mortgages
" 'and other evidence of debt; but the better
" 'opinion seems to be that it does not hold in the
" 'case of visible, tangible, personal property per-
" 'mantly located in another State. It such cases
" 'it is taxable in the jurisdiction where found and
" 'is exempt at the domicile of the owner.'

"The justice of this method of taxation is strong-
"ly supported by the following authorities:

"People *ex rel.* &c. vs. Campbell, 21 N. Y.
"Supp., 8, 48 N. Y. St., 817.

"Hoyt vs. Commissioners, 23 N. Y., 227.

"Comonwealth vs. D. L. & W. R. R. Co., 145
"Pa. St., 96.

"See also note to City of New Albany vs.
"Meekin, 56 Am. Dec., 523.

"Swift's Estate, 32 N. E., 1097.

"While these cases most ably defend the justice
"of this system of taxation, they do not apply to
"the extent of denying the power of the State to
"tax by express legislation, property of its citizens
"without its territorial limits and having a taxable
"situs elsewhere.

"Since the submission of this case, the Supreme "Court of the United States, in the case of Com- "monwealth vs. The Louisville and Jeffersonville "Ferry Co., on Feb. 23rd, 1903, has delivered an "opinion more thoroughly decisive of this branch "of the case at bar, than any to which this Court's "attention has been called, though the foregoing "conclusions had, in the main, been reached before "that opinion was read. In the course of quite an "extended opinion, the Supreme Court says, quot- "ing from Chief Justice Marshall in McCullough "vs. Maryland, 4 Wheat., 316, 429:

" 'While all subjects over which the sovereign " 'power of a State extends are objects of taxation, " 'those over which it does not extend, are, upon " 'the soundest principles, exempt from taxation.'

"Further on, approving and citing Cooley on "Taxation, the same opinion says:

" A State can no more subject to its power a " 'single person or a single article of property " 'whose residence or legal situs is in another " 'State, than it can subject all the citizens or all " 'the property of such other State to its power.'

"Still further on, the opinion continues:

" 'The ferry franchise derived from Indiana is " 'an incorporeal hereditament derived from and " 'having its legal situs in that State. It is not " 'within the jurisdiction of Kentucky. The taxa- " 'tion of that franchise or incorporeal hereditа- " 'ment by Kentucky, is, in our opinion, a deprivа- " 'tion by that State of the property of the ferry " 'company without due process of law in violation " 'of the fourteenth amendment of the Constitution " 'of the United States; as much so as if the State " 'taxed the real estate owned by that company " 'in Indiana.'

"In concluding this opinion, the Court says:

" 'We decide nothing more than it is not com- " 'petent for Kentucky, under the charter grant- " 'ed by it, and under the Constitution of the " 'United States, to tax the franchise which its " 'corporation, the ferry company lawfully re-

"'quired from Indiana, and which franchise or
"'incorporeal hereditament has its situs, for pur-
"'poses of taxation, in Indiana.'

"If the situs of property, for purposes of taxa-
"tion, in another State, is sufficient, as this case
"clearly holds, to deprive Kentucky of the power
"to tax such property, then it follows conclusively
"and irresistably, that to the extent, the property
"of this defendant has such situs elsewhere, the
"taxing power of this State cannot reach it.

"It is furthermore contended that if defndant,
"solely because it is a resident of Kentucky, is to
"be taxed upon all of its property, without regard
"to its situs, while other companies doing a similar
"business in this State, but being non-residents,
"are to be taxed only upon that portion of their
"property which has acquired a situs here, such
"non-resident corporation would thereby 'be al-
"lowed to transact business within the State upon
"more favorable conditions than are prescribed by
"law to similar corporations organized under the
"laws of this Commonwealth,' thereby violating
"Sec 202 of the Kentucky constitution. While this
"character of discrimination is, perhaps, not of
"the character the framers of the Constitution had
"in view, it unquestionably comes within the spirit
"of the inhibition. The State could with as little
"violence to this section, offer premiums and
"bounties to non-resident corporations, a lower
"tax rate, or entire immunity from taxation, or
"taxation upon a part of its property, while all
"the property of its resident rival, was taxed.

"In view, however, of the conclusions reached
"upon other branches of the case, it is not neces-
"sary to discuss this question at greater length.

"Paragraphs 4, 5, 6, 10 and 16, asserting de-
"fenses, which the foregoing views tend to sustain,
"the demurrers to each of said paragraphs are
"overruled."

Only one deposition was taken—that of S. P. Vickory, manager of the defendant company. On final submission the County Court entered the following judgment:

"The Court being advised, it is considered by "the Court as follows:

"1. That the Union Refrigerator Transit Com- "pany was the owner of 2,000 cars on September "15, 1897; of a like number on September 15, 1898; "of a like number on September 15, 1899; of a "like number on September 15, 1900.

"2. Said cars and each of them were of the fair "cash value at said several times of the sum of "200 each.

"3. Said cars were employed by the defendant "by renting them to divers and sundry shippers, "who took possession of same from time to time, "at Milwaukee, Wisconsin, and used them for the "carriage of freight over divers and sundry rail- "roads in the United States, Canada and Mexico, "the defendant being paid by the railroads in "accordance with the mileage made by said cars "over said lines.

"4. That the correct method of ascertaining "the number of said cars which should be assessed "for taxation in Jefferson county, Kentucky, for "each of said years, is to ascertain the amount of "earnings made by any and all of said cars upon "any line of railroad wholly or partly in the State "of Kentucky; to apportion the earnings made on "lines which are partly within and partly out of "Kentucky, according to the mileage of such lines "in and out of Kentucky, and by this means as- "certain the gross earnings made by the defendant "upon all its cars in Kentucky; then find the total "amount of gross earnings made by the defendant, "and divide these gross earnings by the total num- "ber of cars, to show the amount of gross earnings "in Kentucky by the gross earnings made by each "car. Following this method, the court finds that "there were subject to assessment in Jefferson "county, Kentucky, as of,

"September 15, 1897 .....28 cars
"September 15, 1898 .....29 cars
"September 15, 1899 .....40 cars
"September 15, 1900 .....67 cars

"The Court therefore finds that the proper as-
"sessment to be made against the defendant as of,

"September 15, 1897, is .....$ 5,600
"September 15, 1898 5,800
"September 15, 1899 8,000
"September 15, 1900 13,400

"6. It is adjudged by the Court that the de-
"fendant owes State and county taxes upon the
"assessment for said years as follows: 1898,
"51.80, until paid; 1899, $37.58, until paid; 1900,
"$50.00, until paid; 1901; $102.51; and it is further
"adjudged that the defendant is liable for penalties
"as follows: 1898, $10.36; 1899, $7.50; 1900, $10.00;
"1901, $20.50; and the county clerk is directed to
"enter said assessments and to certify the same as
"directed by Sec. 4241 of the Kentucky Statutes.

"7. The Court finds that the defendant is not
"liable for assessment for any years other than
"those mentioned herein.

"8. The Court finds that none of the cars of the
"defendant, other than those herein mentioned, are
"liable to assessment for any of said years; and to
"so much of this order as decides that cars other
"than those mentioned in this judgment are not
"liable to assessment, and that defendant is not
"liable for assessment for other years, the plaintiff
"prays an appeal to the Court of Appeals of Ken-
"tucky, which is granted. And to so much of this
"order as holds that the defendant is liable to any
"assessment, the defendant prays an appeal to
"said Court of Appeals of Kentucky, which is
"granted. Both parties presented to the Court
"and asked to be signed, a bill of exceptions; and
"the same is accordingly so signed and made a
"part of the record."

In the transcript this is given as the judgment of the Circuit Court, but the clerical error is corrected by the signature of the Judge of the County Court. An appeal was taken to the Jefferson Circuit Court. This Court entered exactly the same judgment as had been entered

by the County Court (R. 62-63). An appeal having then been taken by the Commonwealth to the Court of Appeals the judgment was reversed. The opinion of this Court will be found at R. 67-73, and an extension of the opinion at R. 76.

It will appear from reading the opinion of the County Judge and the final judgment entered by that Court, the final judgment entered by the Circuit Court and the final judgment entered by the Court of Appeals that whereas the County Court and the Circuit Court held that only such proportion of the cars of the Refrigerator Company as could be ascertained upon a gross earnings basis to be within the jurisdiction of the State of Kentucky, could be assessed for taxation for the years in controversy, the Court of Appeals held that the provisions of Section 4020 were to be taken literally and that as the Refriegrator Company was a corporation organized under the laws of Kentucky, all its personal property, whether in or out of Kentucky, was subject to taxation in Kentucky; that this section did not violate the Constitution of the State of Kentucky or that of the United States, and, further, that the State of Kentucky had the right to tax only a proportion of the cars of railroad companies and all the cars of the Refrigerator Company, and that this was not a discrimination inimical to the Constitution of the State of Kentucky or of the United States.

The federal questions presented in the County Court and again in the Circuit Court and in the Court of Appeals were two: First, that it was not competent to assess property of the Refrigerator Company not having a situs in Kentucky or having acquired a situs outside of Kentucky; second, that there was an unlawful discrimination against the Refrigerator Company in attempting to tax all cars belonging to it whereas in taxing railroads only such proportion of their cars were taxed as their user in Kentucky bore to their user outside of Kentucky. We print in th appendix the following sections of the Constitution of Kentucky: 171, 172, 174, 182 and 212; and the following sections of the Kentucky Statutes: 4241, 4020 4077, 4079, 4080, 4081, 4096, 4098, 4102.

The Union Refrigerator Transit Company brings the case to this Court on the following assignment of errors:

"1. The Court erred in holding that property "of plaintiff in error not having a situs in Ken- "tucky and having a situs elsewhere was subject "to taxation or assessment for taxation by the "Commonwealth of Kentucky.

"2. The Court erred in holding that such prop- "erty was so liable to taxation or assessment for "taxation by Kentucky when to do so gives the laws "of Kentucky an extra territorial applcation and "force and deprives plaintiff in error of its prop- "erty without due process of law, contrary to the "Constitution of the United States and the four- "teenth amendment thereof.

"3. The Court erred in holding that such prop- "erty was so liable to taxation or assessment for "taxation when to do so denies to plaintiff in error "the equal protection of the laws contrary to the "Constitution of the United States and the four- "teenth amendment thereof.

"4. The Court erred in holding that such prop- "erty was so liable to taxation or assessment for "taxation when to do so discriminates against the "plaintiff in error and denies to it the equal pro- "tection of the laws contrary to the Constitution "of the United States and the fourteenth amend- "ment thereof.

"5. The Court erred in that its judgment gave "effect to the revenue laws of the Commonwealth "of Kentucky violative of the Constitution of the "United States as amnded." (R. 77).

The constitutional questions are properly raised in the fourth, sixth, tenth and sixteenth paragraphs of the answer of the plaintiff in error. (R. 7 and 16).

It is claimed in behalf of the plaintiff in error that only the average number of its cars usually employed within Kentucky should be taxed by that State; it is claimed in behalf of the Comonwealth, and it was so held by the Court of Appeals of Kentucky, that all the 2,000 cars should be taxed by that State. This is the ultimate question presented. By the opinion of the Court of Appeals (R. 67) it is held that Section 4020 of the Kentucky Statutes required the taxation in Kentucky of all the cars

of the plaintiff in error, wherever located.

It is our purpose to endeavor to prove that Section 4020, of the Kentucky Statutes, as applied by the Court of Appeals of Kentucky, violates the Fourteenth Amendment to the Constitution of the United States. To this end, we make the following statement of the propositions which we shall urge:

"Section 4020 of the Kentucky Statutes violates "the provisions of the Fourteenth Amendment to "the Constitution of the United States; because

"1. The Legislature of Kentucky Had No "Power to Authorize the Assessment for "Taxation of Tangible Personal Property "Which Has Acquired a Taxable Situs Out- "side the Territorial Limits of the State and "in Other Jurisdictions.

"2. Section 4020 of the Kentucky Statutes "as Construed by the Court of Appeals of "Kentucky, Denies the Plaintiff in Error that "Protection of the Laws Afforded Railroads "by Section 4096.

ARGUMENT.

"SECTION 4020 OF THE KENTUCKY STATUTES, "AS APPLIED IN THIS CASE VIOLATES THE PRO- "VISIONS OF THE FOURTEENTH AMENDMENT TO "THE CONSTITUTION OF THE UNITED STATES."

There are two distinct lines of argument by which we believe can be shown the fact of the repugnancy of Section 4020, as applied to this case by the Court of Appeals of Kentucky, to the terms of the Fourteenth Amendment. These we shall discuss in order.

1.

"THE LEGISLATURE OF KENTUCKY HAD NO "POWER TO AUTHORIZE THE ASSESSMENT FOR "TAXATION OF TANGIBLE PERSONAL PROPERTY "WHICH HAS ACQUIRED A TAXABLE SITUS OUT- "SIDE THE TERRITORIAL LIMITS OF THE STATE AND "IN OTHER JURISDICTIONS."

The taxation of personal property as controlled by its situs has been often before this Court. It is not to be disputed that land can only be taxed by the sovereignty in whose jurisdiction the land is situated. The growth of the country has, however, produced properties which lie partly in one and partly in another sovereignty and it has been held by this Court that it is competent, in ascertaining the value of such property for taxation, to consider the value of the whole as affecting the value of each part. This has been applied to such property as that of the Western Union Telegraph Company(Western Union Telegraph Co. vs. Taggart, 163 U. S., 1), and to railroad property (Pittsburg, Cincinnati, &c., Ry. vs. Backus, 154 U. S., 439). There is another kind of property which, while not connected into one whole as a railroad may be considered by the union of its rails, or a telegraph line by the union of its wires, may yet, through a unity of use, take a character similar to a physical unity. In these cases, too, this Court has sustained the right of a State, in valuing that part within the sovereignty, to take into consideration the value of the whole. (Adams Express Co. vs. Ohio, 165 U. S., 194; Adams Express Co. vs. Indiana, 165 U. S., 194; Adams Express Co. vs. Kentucky, 166 U. S., 172).

Steam vessels plying the ocean or rivers are still another kind of property whose taxation has been considered. In Hays vs. Pacific Mail Steamship Co., 17 How., 596, a New York corporation owned steam vessels engaged in the transportation of passengers and freight between New York and San Francisco and between San Francisco and dofferent ports in Oregon, registered in New York; it was held that these vessels were not subject to taxation in California although they regularly arrived at and departed from San Francisco.

In Morgan vs. Parham, 16 Wall., 471, it was held that a vessel owned by a citizen of New York and registered in New York was not subject to taxation in Alabama though engaged in commerce in a regular line of steamers between Mobile in that State and New Orleans, Louisiana.

In St. Louis vs. Ferry Company, 11 Wall., 423, a ferry company incorporated by the laws of the State of Illinois had boats engaged in ferrying from East St. Louis,

Illinois, to St. Louis, Missouri. It was held that these ferry boats were not taxable in St. Louis.

In Gloucester Ferry Company vs. Pennsylvania, 114 U. S., 196, vessels belonging to a New Jersey corporation, engaged in ferrying from Gloucester to Philadelphia, were held not taxable in Pennsylvania.

In Old Dominian Steamship Co. vs. Virginia, 25 S. C. R., 687, vessels owned by a corporation of the State of Delaware, engaged in commerce between two ports in Virginia, were held taxable in Virginia.

In each of these cases the question examined was as to the situs of the steam vessels or steamboats, and the tax was held valid or invalid in accordance with the determination of the actual situs.

In reference to ordinary personal property this Court has determined the matter along similar lines. In State Tax on Foreign Held Bonds, 15 Wall., 300, it was held that the State of Pennsylvania could not tax bonds of Pennsylvania corporations held by non-residents of Pennsylvania. It is said in Blackstone vs. Miller, 188 U. S., 212, that this decision has been cut down to the precise point that the bonds could not be taxed because they were held out of the State.

In Coe vs. Errol, 116 U. S., 524, the State of New Hampshire was held to have rightfully taxed property of a citizen of Maine, such property being logs floating in a boom in New Hampshire.

In Diamond Match Company vs. Ontonagon, 188 U. S., 93, a similar principle was applied as to logs belonging to a corporation organized under the laws of Illinois which were in a boom in a river in Michigan.

In Brown vs. Houston, 114 U. S., 622, it was held that the State of Louisiana had the right to tax coal belonging to citizens of Pennsylvania which has been shipped in barges down the Mississippi river and was lying at the wharf in New Orleans awaiting sale.

In Pittsburg Coal Company vs. Bates, 156 U. S., 577, it was held that the State of Louisiana had the right to tax coal owned by a Penslyvania corporation, which was destined to New Orleans, but was moored at Baton Rouge.

In New Orleans vs. Stempel, 175 U. S., 309, the Court held that money belonging to a citizen of New York, held

for investment and from time to time invested by an agent at New Orleans, had such a situs in New Orleans as to be there taxable. The same principle was applied in the case of Bristol vs. Washington County, 177 U. S., 145, where money of a citizen of New York was, by an agent, loaned on mortgage in the State of Minnesota, it being held that the investments of this money had a situs in Minnesota which made it there taxable.

There is still another kind of property of which that attempted to be taxed in this case is an example. There are many corporations in the United States engaged in the business of leasing out cars which run over the lines of railroads traversing the whole of the United States. These cars are constantly moving. It is next to impossible to ascertain how many of them are in any particular sovereignty on any named day, and the same car may be in different sovereignities on the day fixed for the annual assessment of property, such day not being the same in each of the States.

In Pullman Company vs. Pennsylvania, 141 U. S., 22, this Court held that cars of the Pullman Company running upon the rails of railroads in the State of Pennsylvania were taxable and that Pennsylvania had the right to devise a fair method of ascertaining the average number of such cars used in Pennsylvania every year—this without regard to what was the particular car—and to tax such average number of cars although the Pullman Company (the owner) was a corporation created by the laws of the State of Illinois.

In American Refrigerator Company vs. Hall, 174 U. S., 70, it was held that the State of Colorado had the right to ascertain the average number of cars belonging to the American Refrigerator Company, a corporation of the State of Illinois, which were used in Colorado during the year, and to tax them; and the fact that such cars simply moved through the State or from a point outside of the State into the State, or from a point within the State to a point outside of the State did not prevent their acquiring a sufficient situs to be taxed in Colorado.

Exactly the same principle was applied in the case of the Union Refrigerator Company vs. Lynch, 177 U. S., 149, where the cars of the present plaintiff in error (also

plaintiff in error in that case) were taxed by the State of Utah, the taxing authorities ascertaining the average number of such cars which passed through or were used in the State during the year for which the assessment was made. In other words, in all three of these cases it was held that property of the character involved in the present controversy was capable of acquiring and did acquire a situs within the sovereignty sufficient to authorize such sovereignty to tax it although the cars were constantly moving, passing through, out of and into the taxing sovereignty. In all of these cases in which the Court held that personal property capable of acquiring a situs separate from the domicile of its owner could be taxed by the sovereignity in which it had acquired its situs the rule of *mobilia sequuntur personam* was held to be a fiction which must give way to the facts.

We do not think it worth while to bring within this review such cases as involve succession or legacy duties where the maxim is likewise disregarded, these cases being supported, as declared by the Court in Billings vs. Illinois, 188 U. S., 104, on the principle that the State in which real or personal property is situate at the time of the death of its owner has the right to determine its succession and to exact from the successor designated by will or by lair a portion of the estate coming to him under the law; and this is without regard to the residence of the former owner or the residence of the successor.

In Kelly vs. Rhoads, 188 U. S., 1, it was held that the State of Wyoming had no right to assess for taxation a flock of sheep belonging to a citizen of Kansas when the sheep were in Wyoming simply in process of being driven across the State toward their market, it being held that the sheep did not acquire any situs in Wyoming which would subject them to its power of taxation.

The cases which we have thus far sited show beyond controversy that the doctrine of mobilia sequuntur personam has entirely broken down upon one side at least, and that there is no room for the contention that a State cannot tax personal property having an actual situs within its jurisdiction even though such personal property may belong to one not residing within the jurisdiction. Beyond question the proposition is established that actual

situs gives the same taxing power over personal property as over real property, and the reason for this as given is that protection is a sufficient basis for taxation.

In New Orleans vs. Stempel, 175 U. S., 318, this Court quotes with apparent approval certain cases holding that it is beyond the power of the State to assess personal property belonging to one of its citizens having a situs beyond its territorial jurisdiction.

In Louisville & Jeffersonville Ferry Company vs. Kentucky, 188 U. S., 399, this Court held that the Fourteenth Amendment to the Constitution of the United States was violated by a law of the State of Kentucky attempting to tax a ferry franchise owned by a Kentucky corporation which it had derived from the State of Indiana.

In Delaware R. R. Co. vs. Commonwealth, 25 S. C. R., 669, this Court held that the Fourteenth Amendment prohibited the State of Pennsylvania from taxing coal belonging to a Pennsylvania corporation having actual situs in New York and Illinois.

In determining whether property can be taxed by a particular State the question whether it is in fact taxed in some other State is of no significance. Kelly vs. Rhoads, 188 U. S., 1, and Coe vs. Errol, 116 U. S., 517. In other words, the right of one State to tax does not depend upon the exercise of non-exercise of a similar power to tax by another State.

We shall endeavor to show in the course of our argument in which we shall state more elaborately some of the cases briefly referred to above—that the right to tax personalty as well as realty rests upon the fact that such personalty as well as realty is situated within the territorial jurisdiction of the sovereignty levying the tax; that the domicile of the owner is an immaterial circumstance in the case of personal as well as of real property and that property of the character sought to be reached in this case is capable of acquiring and does acquire a situs in every sovereignity in which it is used.

One or the other of two propositions is true: either personal property may be taxed both by the State in which its owner resides and by the State in which it has its situs, or alone by the State in which it has its situs. That the absence of the owner does not exclude power to tax is

true beyond controversy. We submit it is equally true that the absence of the property excludes the power to tax, in other words, that actual situs is as essential an element of the power to tax in the case of personal property as in the case of real property.

To state the proposition in another form, we submit that the revenue statutes of a State can have no extra—territorial effect and cannot affect property, the taxable situs of which is elsewhere

As noted above it has been declared by this Court that the cars of this very plaintiff in error have a taxable situs outside the State of Kentucky, and this Court has upheld their taxation elsewhere.

In the case of the Union Refrigerator Transit Company vs. Lynch, 177 U. S., 149; this plaintiff in error sued Stephen H. Lynch, Treasurer and Collector of Taxes of Salt Lake County, Utah, to recover $5.76, the amount of taxes paid under protest on 10 of its cars which were assessed in 1897 by the State board of equalization. A demurrer to the petition was sustained; this ruling was affirmed by the Supreme Court of Utah; and the case was carried to the Supreme Court of the United States, where it was claimed that "the taxation of the ten cars of the plaintiff in error was forbidden by the Constitution of the United States because they had no situs for that purpose in the State of Utah."

In the course of the opinion of this Court, delivered by Mr. Chief Justice Fuller, it is said:

> "In American Refrigerator Transit Co. vs. Hall,
> "174 U. S. 70, quotations were made from the opin-
> "ions in Pullman's Palace Car Co vs. Pennsylvan-
> "ia, 141 U. S. 30, 35; Adams Exp. Co. vs. Ohio
> "State Auditor, 165 U. S. 194; and Adams Exp.
> "Co. vs. Ohio State Auditor, 166 U. S. 185; and the
> "conclusion of the Court was thus expressed: 'It
> "having been settled, as we have seen, that where
> "a corporation of one State brings into another, to
> "to use and employ, a portion of its movable
> "personal property, it is legitimate for the latter
> "to impose upon such property, thus used and em-
> "ployed, its fair share of the burdens of taxation
> "imposed upon similar property used in like way

"by its own citizens, we think that such a tax may "be properly assessed and collected, in cases like "the present, where the specific and individual "items of property so used and employed were not "continuously the same, but were constantly chang- "ing, according to the exigencies of the business, "and that the tax may be fixed by an appraise- "ment and valuation of the average amount of the "property thus habitually used and employed.' "

The opinion closed with the following parapragh as to the case under discussion:

"The objection is not that too many cars were "assessed, or that they were assessed too much, or "in an imporper manner, even if we could consider "such questions, but simply that they could not be "taxed at all. And this objection was considered "and overruled in the cases to which we have "referred. Judgment affirmed."

It is thus established beyond question that these cars of the plaintiff in error actually acquire a situs of their own, distinct from the domicile of their owner, beyond the territorial limits of the State of Kentucky, and that they are subject to taxation by those jurisdictions in which they may be found.

In 1. Cooley on Taxation (3 Ed.) 84, it is said:

"Persons and property not within the territorial "limits of a State cannot be taxed by it. In such "cases the State affords no protection, and there "is nothing for which taxation can be equivalent."

Again, in the same work, at page 249, it is said:

"Those cases in which it has been held incompet- "ent for a State or municipality to levy taxes on "property not within its limits have generally in- "dicated the want of jurisdiction over the subject "of the tax as the ground of invalidity. But such "a burden would be inadmissible, also, for the "reason that, as to any property or person out- "side the district in which the tax was levied, the "want of legal interest in the tax would preclude "its being subject to the burden. A State can no "more subject to its power a single person or a "single article of property whose residence or legal

"situs is in another State, than it can subject all "the citizens or all the property of such other "State to its power."

It is commonly said that "taxation and protection are reciprocal," that in the foundation of the government's right to tax the property of its citizens there lies the corresponding duty upon the government to protect that property.

1. Cooley on Taxation, (3 Ed.) 2, 22, 27.
Rorer on Intersate Law, 204.
State vs. Falkenbridge, 3 Green (N. J.), 320.
Wilkey vs. City of Pekin, 19 Ill., 160.
New Orleans vs. Stempel, 175 U. S., 310.
People vs. Commissioner, 35 N. Y., 441.
Pullman vs. Twombley, 29 Fed. 658.
Baldwin vs. Shine, 84 Ky., 502.

This being a fundamental principle of taxation, it is difficult to understand how a State which assumes the right to tax property that is situated beyond its limits can perform the corresponding duty to protect that property. As the property is protected by the State wherein it is located, in return for that protection there arises to that State the right of taxation. A state which can afford no protection to property, because the property is not within its limits, has, in reason, no right to exercise the power of taxation, for there is no consideration therefor.

In the case of Louisville & Jeffersonville Ferry Company vs. Commonwealth of Kentucky, 188 U. S., 394; the Board of Valuation and Assessment of Kentucky, in fixing the value of the franchise of the ferry company, a Kentucky corporation, had considered the value of a franchise granted to it by the State of Indiana, the result being that the ferry company in Kentucky was taxed on the franchise granted by and exercised in Indiana. This having been upheld by the Courts of Kentucky, the case was brought to the Supreme Court of the United States by the ferry company. In reversing the judgment of the Court of Appeals of Kentucky, this Court, Mr. Justice Harlan delivering the opinion, said:

"There is, in our judgment, no escape from the "conclusion that Kentucky thus asserts its authori- "ty to tax a property right, an incorporeal hered-

"itament, which has its situs in Indiana. While "the mode, form and extent of taxation are, speak- "ing generally, limited only by the wisdom of the "legislature, that power is limited to a principle "inhering in the very nature of constitutional "government, namely that the taxation imposed "must have relation to a subject within the juris- "diction of the taxing government.

"We recognize the difficulty which sometimes "exists in particular cases in determining the situs "personal property for the purpose of taxation, "and the above cases have been referred to because "they have gone into judgment and recognize the "general rule that the power of the State to tax "is limited to subjects within its jurisdiction or "over which it can exercise dominion. No difficul- "ty can exist in applying the general rule in this "case; for, beyond all question, the ferry franchise "derived from Indiana is an incorporeal heredita- "ment derived from and having its legal situs in "that State. It is not within the jurisdiction of "Kentucky. The taxation of that franchise or "incorporeal hereditament by Kentucky is, in our "opinion, a deprivation by the State of the proper- "ty of the ferry company without due process of "law in violation of the 14th Amendment of the "Constitution of the United States; as much so as "if the State taxed the real estate owned by that "company in Indiana."

The case just mentioned was discussed at length and approved by this Court in the case of The Delaware, Lackawanna & Western Railroad Company vs. Commonwealth of Pennsylvania, 198 U. S., 341, decided on May 15, 1905. In this case, the authorities of Pennsylvania, in appraising the value of the capital stock of the railroad company, included in the appraisement the value of certain coal that had been mined by the company in Pennsylvania but which, at the time of the appraisement, was located in other States, awaiting sale. It was contended on behalf of the company that the value of this coal should be deducted from the value of the capital stock, since a tax levied by the State of Pennsylvania up-

on the total value of the capital stock would necessarily include a tax on the value of the coal which was beyond the limits of the State. It was held by this Court that such results would follow a tax on the total value of the capital stock, and that, while theoretically the tax was on the value of the capital stock, yet as that value included the value of the coal mentioned the tax was really on the coal. The question presented, in so far as we are here interested, was whether the State of Pennsylvania had power to tax the coal, located at the time of the appraisement authorized by the Statute beyond its territorial limits.

In the opinion of this Court, delivered by Mr. Justice Peckham, it is said:

> "So, if the State cannot tax tangible property "permanently outside the State and having no "situs within the State, it cannot attain the same "end by taxing the enhanced value of the capital "stock of the corporation which arises from the "value of the property beyond the jurisdiction of "the State.
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> "We think the State Court is right in deducting, "as it does, the value of the tangible property, "when permanently held in another State, and we "think that for the same reason the same rule "should obtain in the case of tangible property "situated, as this coal was. We cannot see the dis- "tinction, so far as the question now before the "Court is concerned, between a tax assessed upon "property, *eo nomine*, or specifically, when out- "side the State, and a tax assessed against the cor- "poration upon the value of its capital stock to "the extent of the value of such property, and "which stock represents to that extent that very "property. If the property itself could not be "specially taxed because outside the jurisdiction "of the State, how does the tax become legal by "providing for assessing the tax on the value of "the capital stock to the extent it represents that "property and from which the stock obtains its "increased value? Can the mere name of the tax "alter its nature in such cases? If so, the way is

"found for taxing property wholly beyond the "jurisdiction of the taxing power by calling it a "tax on the value of capital stock or something "else, which represents that property. Such a tax, "in its nature, by whatever name it may be called, "is a tax upon the specific property which gives the "added value to the capital stock.

"Although the coal may have entered into "the value of the capital stock when mined, the "question is whether the value of the stock in "November, 1899, when the appraisement was di- "rected by the statute to be made, should not be de- "creased by the deducting the value of the coal "therefrom which was not in the State at the time "of the appraisement. We think it should; other- "wise the tax amounts in substance to a specific "tax on the coal. Taking the different prices of "the stock at different times in the year, and the "average price thereof, and otherwise following "the provisions of the statute, simply makes a way "of finding the value of the stock between the 1st "and 15th of November in each year. That is the "material time when the value is to be ascertained, "and at that time this coal was not in the State. "An appraisement thus made, which includes such "property, is to that extent without jurisdiction "and illegal. It is true that in general an appraise- "ment of, or an assessment of a tax upon, value is "a decision upon a question of fact, and a differ- "ence of opinion as to the value between the "assessing officer and the Court is immaterial, and "the decision of the former is final. But where the "appraisement is arrived at by including therein "tangible property which is beyond the jurisdic- "tion of the State, and which, therefore, the assess- "ing officers had no jurisdiction to appraise, (and "none could be given them by the statute,) such an "appraisement or assessment is absolutely illegal, "as made without jurisdiction."

After discussing and approving the case of Louisville & Jeffersonville Ferry Company vs. Commonwealth of Kentucky, supra, the opinion closes as follows:

"It is plain that in the case at bar the coal had "lost its situs in Pennsylvania by being transport- "ed from that State to foreign States for the pur- "poses of sale, with no intention that it should "ever return to its State of origin. It was, there- "fore, as much outside the jurisdiction of the State "of Pennsylvania to tax it as was the Indiana fran- "chise in the case just cited, and it has been taxed "just as directly and specifically under the facts "stated in this case as was the Indiana franchise "taxed in Kentucky by the valuation of the Ken- "tucky franchise, which value was increased by "the value of the franchise created by Indiana. "Taxation of the coal in this case deprived the "owner of its property without due process of law "as is held in the above case, and the owner is "entitled to the protection of the Fourteenth "Amendment, which prevents the taking of its "property in that way."

In the case just cited, it was conceded by counsel for the State of Pennsylvania that "it was never within the intent or the power of the legislature to impose a tax upon tangible property, when held outside of the territorial limits of the State," and this Court held affirmatively that the legislature possessed no such power.

We maintain that under these cases, Louisville and Jeffersonville Ferry Company vs. Kentucky, and Delaware, Lackawanna & Western Railroad Company vs. Pennsylvania, Section 4020 of the Kentucky Statutes, under which, as construed by the Court of Appeals of Kentucky, all the personal property of this plaintiff in error is made taxable in that State, although practically all that property is taxable in other States, and is located beyond the jurisdiction of Kentucky, is unconstitutional as depriving the plaintiff in error of due process of law.

We anticipate an objection of counsel for the defendant in error as to the applicability of the Pennsylvania case to the case at bar. It will doubtless be said that the coal in that case was, as was stated several times in the opinion, "permanently," "definitely and forever" beyond the jurisdiction of Pennsylvania. It will be said that, in so far as the State was concerned, the coal had acquired a

permanent situs elsewhere. It will be pointed out that there is as between that coal and the 2,000 cars of this plaintiff in error a difference in character; that while coal may have a permanent situs, these cars are of a movable, transitory nature, and are incapable of acquiring a situs other than that fictitious situs given them at the domicile of their owner.

It is true that the cars of the plaintiff in error were always moving. The same cars may, in the course of a year, have passed through every State in the Union. It is equally true that many of the cars may never have been within the limits of Kentucky. In the Pennsylvania case, it was said:

> "It is also said that by reason of the alleged "transitory character of the coal it has never, in "law, lost its original domicile, which still remains "in Pennsylvania and is subject to be there in- "cluded in the value of the capital stock of the cor- "poration.
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> "The asserted transitory nature of this property "does not seem to us to be material. At the time "of the appraisement it had been transported be- "yond the jurisdiction of the State, never to return "in kind, but was intended to be sold in the foreign "State. Such property is entirely unlike the pro- "perty involved in Commonwealth vs. American "Dredging Co. (122 Penn. 386.) That property "consisted of vessels, or scows, or tugs, only tem- "porarily out of the State of Pennsylvania, for "the purpose of engaging in business, and liable "to return to the State at any time, and was with- "out any actual situs beyond the jurisdiction of "the State itself. However temporary the stay of "the coal might be in the particular foreign States, "where it was resting at the time of the appraise- "ment, it was definitely and forever beyond the "jurisdiction of Pennsylvania. And it was within "the jurisdiction of the foreign States for purpose "of taxation, and in truth it was there taxed."

This Court distinctly said that "the asserted transitory nature of this property does not seem to us to be material." It was sufficient that at the time of the appraisement

by the State of Pennsylvania, the coal had acquired a taxable situs elsewhere.

It seems to us that this anticipated objection is fully met by the decisions of this Court. The Pullman Palace Car Company employed about one hundred cars on the various railroads traversing Pennsylvania. Under various statutes of the State a tax was assessed against the company based on the value of its capital stock employed in Pennsylvaia. This was held to be, in effect, a tax upon the cars of the company employed within the State, and it was upheld. In the opinion of this Court (Pullman's Palace Car Company vs. Commonwealth of Pennsylvania, 141 U. S., 22), Mr. Justice Gray said:

> "The cars of this company within the State of "Pennsylvania are employed in interstate com- "merce; but their being so employed does not "exempt them from taxation by the State; and the "State has not taxed them because of their being "so employed, but because of their being within "its territory and jurisdiction. The cars were con- "tinuously and permanently employed in going "to and fro upon certain routes of travel. If they "had never passed beyond the limits of Pennsyl- "vania, it could not be doubted that the State could "tax them, like other property within its borders, "notwithstanding they were employed in inter- "state commerce. The fact that, instead of "stopping at the State boundary, they cross that "boundary in going out and coming back, cannot "affect the power of the State to levy a tax upon "them. The State, having the right, for the pur- "poses of taxation, to tax any personal property "found within its jurisdiction, without regard to "the place of the owner's domicile, could tax the "specific cars which at a given moment were with- "in its borders. The route over which the cars "travel extending beyond the limits of the State, "particular cars may not remain in the State; but "the company has at all times substantially the "same number of cars within the State, and con- "tinuously and constantly use there a portion of "its property; and it is distinctly found, as a matter

"of fact, that the company continuously, through-
"out the periods for which these taxes were
"levied, carried on business in Pennsylvania, and
"had about one hundred cars within the State.

"The mode which the State of Pennsylvania
"adopted, to ascertain the proportion of the com-
"pany's property upon which it should be taxed
"in that State, was by taking as a basis of assess-
"ment such proportion of the capital stock of the
"company as the number of miles over which it
"ran cars within the State bore to the whole num-
"ber of miles, in that and other States, over which
"its cars were run. This was a just and equitable
"method of assessment; and, if it were adopted
"by all the States through which these cars ran,
"the company would be assessed upon the whole
"value of its capital stock, and no more."

No satisfactory legal distinction can be drawn between the situation of the Pullman Company and that of the plaintiff in error, the cars of which were "continuously going to and fro upon certain routes of travel."

The Baltimore & Ohio Railroad Company, incorporated under the laws of Maryland, owned no railroad within Virginia; it leased certain connecting lines within that State, however, and employed a portion of its rolling stock there, using its cars and locomotives interchangably upon these leased lines within Virginia and upon other lines without the State. These cars and locomotives were not assigned permantly to the leased lines within Virginia, but were used thereon as occasion demanded. The State of Virginia undertook to tax this rolling stock, but this Court held (Marye vs. Baltimore & Ohio Railroad Company, 127 U. S., 117), that it could not do so because the tax laws of Virginia, by their terms, applied only to railroad corporations of that State. Mr. Justice Mathews, delivering the unanimous opinion of the Court said:

"It is not denied, as it cannot be, that the State
"of Virginia has rightful power to levy and collect
"a tax upon such property used and found within
"its territorial limits, as this property was used
"and found, if and whenever it may choose, by apt
"legislation, to exert its authority over the sub-

"ject. It is quite true, as the situs of the Balti-
"more and Ohio Railroad Company is in the State
"of Maryland, that also, upon general principles,
"is the situs of all its personal property; but for
"purposes of taxation, as well as for other pur-
"poses, that situs may be fixed in whatever locality
"the property may be brought and used by its
"owner by the law of the place where it is found.
"If the Baltimore and Ohio Railroad Company is
"permitted by the State of Virginia to bring into
"its territory, and there habitually to use and em-
"ploy, a portion of its movable property, and the
"railroad company chooses so to do, it would
"certainly be competent and legitimate for the
"State to impose upon such property, thus used and
"employed, its fair share of the burdens of taxa-
"tion imposed upon similar property used in the
"like way by its own citizens. And such a tax
"might be properly assessed and collected in cases
"like the present, where the specific and individual
"items of property so used and employed were not
"continuously the same, but were constantly chang-
"ing, according to the exigencies of the business.
"In such cases, the tax might be fixed by an ap-
"praisement and valuation of the average amount
"of the property thus habitually used, and collect-
"ed by distraint upon any portion that might at
"any time be found."

The American Refrigerator Transit Company was incorporated under the laws of Illinois. Like the plaintiff in error, it owned and operated refrigerator cars. The State of Colorado undertook to tax the average number of cars employed within its limits. The car company sought to restrain the revenue officers from enforcing payment of taxes assessed. The District Court of Arapahoe County granted the prayer; the Supreme Court of Colorado reversed the judgment of the Lower Court; whereupon the company sought a review in the Supreme Court of the United States.

It was agreed that the following facts existed:

"That the plaintiff has not, and never has had
"any contract of any kind whatsoever by which

"its cars were leased or allotted to or by which "it agrees to furnish its cars to any railroad "operating within the State of Colorado; that "it has and has had during said times no office or "place of business nor other property than its "cars within the State of Colorado, and that all "the freight transported in plaintiff's cars in or "through the State of Colorado, including the cars "assessed, was transported in such cars either "from a point or points in a State of the United "States outside of the State of Colorado to a point "in the State of Colorado, or from a point in the "State of Colorado to a point outside of said "State of Colorado, and said cars never were run "in said State in fixed numbers nor at regular "times, nor as a regular part of particular trains, "nor were any certain cars ever in the State of "Colorado, except as engaged in such business "aforesaid, and then only transiently present in "said State for such purposes."

Mr. Justice Shiras delivered the opinion of this Court. (American Refrigerator Transit Company vs. Hall, 174 U. S., 70.) Basing the decision upon the following cases: Western Union Telegraph Co. vs. Massachusetts, 125 U. S., 530; Pullman's Palace Car Co. vs. Pennsylvania, 141 U. S., 18; Adams Express Co. vs. Ohio, 165 U. S., 194; he said:

"Applying the reasoning and conclusions of the "cases hereinbefore cited to those admitted facts, "we have no difficulty in affirming the judgment of "the Supreme Court of Colorado sustaining the "validity of the taxation in question.

"The State statutes impose no burden on the "business of the plaintiff in error, but contemplate "only the assessment and levy of taxes upon the "property situated within the State; and the only "question is whether it was competent to ascertain "the number of the cars to be subjectd to taxation "by requiring into the average number used with- "in the State limits during the period for which the "assessment was made.

"It having been settled, as we have seen, that

"where a corporation of one State brings into an-
"other, to use and employ, a portion of its movable
"personal property, it is legitimate for the latter
"to impose upon such property, thus used and em-
"ployed, its fair share of the burdens of taxation
"imposed upon similar property used in a like way
"by its citizens, we think that such a tax may be
"properly assessed and collected, in cases like the
"present, where the specific and individual items of
"property so used and employed were not contin-
"uously the same, but were constantly changing,
"according to the exigencies of the business, and
"that the tax may be fixed by an appraisement and
"valuation of the average amount of the property
"thus habitually used and employed. Nor would
"the fact that such cars were employed as vehicles
"of transportation in the interchange of interstate
"commerce render their taxation invalid. Marye
"vs. Baltimore & O. R. R. Co., 127 U. S., 123;
"Pullman's Palace Car Co. vs. Pennsylvania, 141
"U. S. 18."

Attention has already been called to the case of Union Refrigerator Transit Company vs. Lynch, 177 U. S., 149.

The effect of these cases is that the question as to the permanency of the location within the State of personal property, such as cars, as affecting that State's right to tax, is immaterial; that the transitory cars of a corporation like the plaintiff in error acquire a taxable situs wherever they are employed; and that while it cannot be determined what particular cars acquire such situs, yet a number equal to the average number employed within a State will be presumed to have become so localized.

In the case now under discussion (Delaware, Lackawanna & Western Railroad Co. vs. Pennsylvania) there was a distinction drawn between the coal in question therein and the property involved in the case of Commonwealth vs. American Dredging Co., 122 Penn., 386, the latter consisting of "vessels, scows, and tugs, only temporarily out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time." The property, as held in the opinion in that case, had no taxable situs at any other

place. On the contrary, the cars of the plaintiff in error, as well as the coal in Pennsylvania case, have an actual, taxable situs away from the home State.

This Court has recognized the difference between cars and vessels. In Pullman's Palace Car Company vs. Pennsylvania, 141 U. S., 22, Mr. Justice Gray said:

> "Between ships and vessels, having their situs "fixed by Act of Congress, and their course over "navigable water, and touching land only inciden- "tally and temporarily, and cars or vehicles of any "kind, having no situs so fixed, and traversing the "land only, the distinction is obvious. As has been "said by this Court: 'Commerce on land between "the different States is so strikingly dissimilar, in "many respects, from commerce on water, that it "is often difficult to regard them in the same aspect "in reference to the respective constitutional "powers and duties of the State and federal gov- "ernments. No doubt commerce by water was "principally in the minds of those who framed and "adopted the Constitution, although both its "language and spirit embrace commerce by land "as well. Maryatime transportation requires no "artificial roadway. Nature has prepared to hand "that portion of the instrumentality employed. "The navigable waters of the earth are recognized "public highways of trade and intercourse. No "franchise is needed to enable the navigator to "use them. Again, the vehicles of commerce by "water being instruments of intercommunication "with other nations, the regulation of them is as- "sumed by the National Legislature. So that "State interferance with transportation by water, "and especially by sea, is at once clearly marked "and distinctly discernible. But it is different "with transportation by land.' Baltimore & O. R. "Co vs. Maryland, 21 Wall, 456, 470."

So, the vessels in American Dredging Co. vs. Pennsylvania, had they been registered ships, would have been taxable at their port of registery; not being so, and not having an actual, independent situs, they were taxable at the domicile of their owner.

It is to be observed that the County Court and Circuit Court found as a fact that the cars of the Refrigerator Company were employed by renting them to divers and sundry shippers who took possession of them from time to time at Milwaukee, Wisconsin, and used them for the carriage of freight on divers and sundry railroads in the United States, Canada and Mexico, the plaintiff in error being paid by the railroads for them according to the mileage made by the cars over their several lines.

Such was the effect of the testimony in the case.

The repair shops of the company were at Milwaukee. The cars were there turned over to the shippers (R. 43.) There were no shippers in Kentucky; no freight originated there; the only cars ever in Kentucky were those which passed through Kentucky.

The Court of Appeals in no way challenged this finding, deciding the case on the broad ground that by Section 4020 the cars were taxable because they belonged to a corporation organized under the laws of the State of Kentucky, and without any regard to their situs.

We submit that the case at bar is controlled by the case of Delaware, Lackawanna & Western R. R. Co. vs. Pennsylvania, supra, and that section 4020, of the Kentucky Statutes, under which the State of Kentucky seeks to tax the property of the plaintiff in error located beyond its jurisdiction, is violative of the Constitution of the United States, in that by it the plaintiff in error is deprived of its property without due process of law.

2

"SECTION 4020 OF THE KENTUCKY STATUTES, AS APPLIED BY THE COURT OF APPEALS OF KENTUCKY, DENIES THE PLAINTIFF IN ERROR THAT PROTECTION OF THE LAWS AFFORDED RAILROADS BY SECTION 4096."

A general review of certain of revenue laws of Kentucky is necessary as a preface to a discussion of this discussion of this proposition. Section 171, 172, 174 and 182 of the Constitution of that State, are given in the appendix.

The provisions of the Constitution as to taxation were constructed by the Court of Appeals of Kentucky in Levi

vs. City of Louisville, 97 Ky., 394:

"The present constitution is more definite and "specific in its provisions in relation to taxation "than our former constitution, and to such an ex- "tent as to leave but little for the legislature to do "in having them executed. The exercise of legisla- "tive power is dispensed with as to the mode of "assessment, and the mode of taxation regulated "by constitutional enactments that under former "constitutions was left to the will of the legisla- "ture.

"There is but one general system of assessment "as to all property, under the present constitution, "for the purposes of government, whether State or "municipal, and in addition taxation may be based "on income, on licenses, and on franchises, and a "head or poll tax. The ad valorum system relates "to the assessment and taxation of all property. " * * * * Under the former State con- "stitution the right to impose one rate of taxation "on one class of property, and a different rate on "another class, was well understood, but in con- "considering the provisions of the present con- "stitution, we find the mode of assessment pre- "scribed by that instrument requiring in plain "terms that all property shall be assessed for "taxation at its fair cash value estimated at the "price it would bring at a fair voluntary sale. It "would do violence not only to the intention of the "farmers of this instrument, but its letter and "spirit, to hold that the system adopted by its "provisions could be disregarded and another "selected better suited to the business of the "municaplity, and more just and uniform in its "terms."

The expressed design of these constitutional sections is to secure that uniformity and, consequently, that equality in the imposition of public burdens which is fundamental in the theory of taxation. Section 4020 of the Kentucky statutes, prescribed what property is subject to assessment for taxation for State purposes:

"All real and personal estate within this

"State, and all personal estate of persons re-
"siding in this State, and of all corpora-
"tions organized under the laws of this State,
"whether the property be in or out of the State,
"including intagible property, which shall be con-
"sidered and estimated in fixing the value of
"corporate franchises as hereinafter provided,
"shall be subject to the taxation unless the same
"be exempt from taxation by the Constitution, and
"shall be assessed at its fair cash value, estimated
"at the price it would bring at a fair voluntary
"sale."

Section 4043 to 4076, inclusive, which we shall not reproduce here, prescribe the mode in which and the machinery by which the property subject to taxation shall be assessed for State purposes.

So much of Section 4019 as is material to the matter is as follows:

"An annual tax of fifty cents upon each one
"hundred dollars of value of all property directed
"to be assessed for taxation, as hereinafter pro-
"vided, shall be paid by the owner, person or cor-
"poration assessed."

This tax is for the State purposes. Sections 1839, 1882 and 1883, of the Kentucky statutes, provide for an annual ad valorem tax for county purposes, directing that the valuation as made for State purposes shall be adopted for county purposes, and fixing the rate. Such, in outline is the general scheme of taxation for State and County purposes.

Returning to the Constitntion, Section 182 thereof provides:

"Nothing in this Constitution shall be con-
"strued to prevent the General Assembly from
"providing, by law, how railroads and railroad
"property shall be assessed and how taxes thereon
"shall be collected. And, until otherwise pro-
"vided, the present law on said subject shall re-
"main in force."

By virtue of this constitutional provision, Section 4096, Kentucky Statutes, given in the appendix, exists. This section requires the chief officer of each railroad com-

pany owning or operating a railroad, lying in whole or part in the State, to report annually to the Auditor of Public Accounts the total length of the railroad and its average value per mile, the length and the average value per mile within the State, and the length and average value per mile within each county, city, town and taxing district, together with the number of engines and cars and a list of the value of depot ground and improvements and other real estate. It is provided, however.

> "That if any of said railroad companies owns or "operates a railroad or railroads out of the State, "the president or chief officer of such company "shall only be required to return such proportion "of the entire value of all its rolling stock as the "number of miles of its railroad in this State bears "to the whole number of miles by said company in "and out of this State.'

Section 4098, Ketucky statutes, given in the appendix, requires the Auditor to lay before the Railroad Commission the returns so made to him; and the valuations for State purposes and the valuations upon which the several cities, towns and tax districts may levy their respective rates are made by the Commission. By Section 4102, Kentucky statutes, given in the appendix, the State may extend upon the valuation so made, the same rates levied on other property; and upon the valuations as aportioned between them, respectively, each city, town and tax district may extend the same rate levied by it on other property.

By Section 212, of the Constitution, and Section 814, of the statutes, the rolling stock of railroads is declared to be personal property.

This system for the taxation of railroads and railroad property as provided by Section 182, of the Constitution, and Sections 4096, 4098 and 4102, Kentucky Statutes, was declared by this Court, in The Kentucky Railroad Tax Case, 115 U. S., 321, not to be in contravention of the Fourteenth Amendment by reason of providing a mode in which and machinery by which the assessment should be made, different from the mode and the machinery provided for assessment of other property. In many other cases this Court has upheld similar systems in the revenue

schemes of other States. With none of these decisions have we any quarrel.

A consideration of the constitutional and statutory provisions to which we have referred, contrasting the results of the operation of the two systems as represented by Section 4020 and 4096 of the Kentucky Statutes, will be interesting and helpful.

The Union Refrigerator Transit Company, a Kentucky corporation, not a railroad, with its home office and legal domicile in Jefferson County, Ky., owns and operates 2,000 cars of the average value of $200, which are used on railroads and for the use of which the Company is paid by those railroads over whose lines they are employed. (R. 62.) These cars acquire a taxable situs in other States and are taxed by other States.

Union Refrigerator Transit Co. vs. Lynch, 177 U. S., 149.

American Refrigerator Transit Co. vs. Hall, 174 U. S., 70.

Pullman's Palace Car Co. vs. Pennsylvania, 141 U. S., 18.

These cars are railroad property, although they are not owned by a railroad company. They can be used only in connection with railroads, and are otherwise valueless. They are used on and by railroads throughout the United States, Canada and Mexico, which pay the company for such use. Comparatively few of them enter the State of Kentucky; and those who use them take possession of them at Milwaukee, Wis., where the repair shops are located. Nevertheless, under Section 4020, as enforced by the Court of Appeal of Kentucky, the company is to be taxed in Kentucky for State purposes on the total value of all its cars, $400,000, at a rate of fifty cents per one hundred dollars, or $2,000. Let us say that the county levy is twenty-five cents per hundred dollars. Under Sections 1839, 1882 and 1883, of the statutes, the company is also to be taxed in Jefferson county for county purposes on the total value of all its cars, at the rate mentioned, making a tax of $1,000.

To illustrate the operation of the other system, as represented by Section 4096, we will take the Louisville & Nashville Railroad Company, also a Kentucky corpora-

tion with its home office and legal domicile in Jefferson County, Ky., which owns and operates a railroad. For the sake of the illustration, we will say that its system embraces 5,000 miles of road, of which 1,000 miles, or one-fifth of the whole, lies within Kentucky. These 1,000 miles of road we will say traverses ten counties of the State, 100 miles thereof, or one-fiftieth of the whole mileage, lying within each of these ten counties. It owns 2,000 cars, of the average value of $200, the total value being $400,000. These cars are operated indiscriminately within and without the several counties and the State. Under Section 4096, all these 2,000 cars are not taxable in Jefferson County, Ky., as are all the 2,000 cars of the Union Refrigerator Transit Company under Section 4020. On the contrary, the State of Kentucky may tax the railroad company for State purposes on only one-fifth of the total value of all its 2,000 cars, or on but $80,000. Upon this valuation is to be extended, according to Section 4102, the same rate that is applied to other property, producing a tax of $400. And for County purposes, for each of the ten counties traversed by its road, the railroad company is to be taxed on only one-fiftieth of the total value of all its cars, or $8,000. Upon this valuation is to be extended, according to Section 4102, the same rate that is applied to other property, twenty-five cents per one hundred dollars, which will produce a tax of $20 for each of the ten counties. This is the operation of the system for the taxation of railroads and railroad property as approved in the Kentucky Railroad Tax Cases, 115 U. S., 321,

So, the Union Refrgerator Transit Company, owning 2,000 cars, valued at $400,000, pays to the State of Kentucky on the total valuation a rate of fifty cents per hundred dollars, or $2,000, and to the County of Jefferson on the total valuation a rate of twenty-five cents per one hundred dollars, or $1,000; making its total liability on all its property for State and County purposes, $3,000. The Louisville & Nashville Railroad Company, on the other hand, pays to the State of Kentucky the same rate on but one-fifth the total value of all its cars, or $400; and to each of the ten counties throughout which its road runs the same rate on but one-fiftieth of the total value

of all its cars, or $20 to each county. Owning similar property of the same value, the taxes paid by the one amount to $3,000, those paid by the other to but $600, annually.

It is clear that the only difference between the cars of the two companies lies in the difference between their respective owners, one being a railroad company, the other not being such. This is conclusively shown by the fact that if all the 2,000 cars of the Louisville & Nashville Railroad Company were purchased by the Union Refrigerator Transit Company, the latter would have to pay taxes on the total value of all; while on the other hand, if the cars of the Union Refrigerator Transit Company were purchased by the Louisville & Nashville Railroad Company the latter would have to pay taxes on only a small proportion of their total value.

Therefore, it is apparent that the difference between the cars of the Union Refrigerator Transit Company and the cars of the Louisville & Nashville Railroad Company is merely a difference in ownership. All the cars of the one are taxed in Kentucky because the owner is not a railroad corporation; only a small proportion of the cars of the other are taxed because the owner is a railroad corporation; the rate being the same in both cases.

In the tenth and sixteenth paragraphs of the answer filed by the plaintiff in error in the Jefferson County Court, (R. 12 and 16), it is pleaded that the plaintiff in error is by Section 4020, Kentucky Statutes, denied that protection of the law afforded railroad companies by Section 4096. It is also pleaded generally in the sixth paragraph (R. 11) that Section 4020 contravenes the Fourteenth Amendment.

It is our theory that it was the design of Section 182 of the Constitution merely to so far relax the demands of Sections 171, 172 and 174 as to uniformity as to allow the Legislature to provide for the assessment of railroads and railroad property a mode and machinery different from that provided for the assessment of property generally. It could not have been the intention of the framers of the Constitution of Kentucky, after providing in Sections 171, 172 and 174 for uniformity and equality, to exempt railroads therefrom by Section 182. For it is obvious that to value all the property of one corporation,

and but a small proportion of another, and to levy upon both valuations the same rate of taxation is to work a serious discrimination.

As to this branch of the case, the Court of Appeals of Kentucky, said:

> "It is said that the fact that all of appellee's "cars are taxed whether in this State or not, while "in assessing the property of railroads the cars in "use out of the State are omitted, is an unjust dis- "crimination against it, and is violative of the "Fourteenth Amendment as to the equal protec- "tion of the laws. Railroad corporations occupy "a unique position in our fiscal system. They are, "by the express language of the Constitution, "taken out of the category of other property in "the manner in which they are taxed; but, in so "doing, it is not intended to violate the funda- "mental principles of the Constitution as to un- "iformity in taxation, but on the contrary to en- "force and secure it; and it is confidently believed "that the system devised does accomplish the end "desired as nearly as may be. We will not burden "this opinion with any attempt to show the reasons "for the distinction in the fiscal law as to railroads, "nor the fact that they are not unduly favored in "their isolation; these are obvious, and this Court "has uniformly upheld the validity of the statutes "which provide and enforce the anomalous mode "of taxation applicable to them. Kidd vs. Ala- "abama, supra, and The Kentucky Railroad Tax "Cases, 115 U. S. Rep., 321, are conclusive of the "Federal question."

The Court of Appeals of Kentucky have thus construed the Constitution and the revenue statutes as authorizing on the one hand, the taxation of a Kentucky corporation, not a railroad company or an individual resident of the State owning railroad cars located outside the State, on the total value of all those cars; and on the other hand, the taxation of railroad companies, owning or operating lines partly within and partly without the State, on a small proportion of the total value of all their cars; the rate of taxation being the same. With this construction

as conclusive, it is for this Court to say whether or not the Constitution of the United States is infringed.

Courlan vs. Doull, 133 U. S., 266.
First National Bank vs. Chihalis County, 166 U. S., 440.
Yazoo & M. V. R. Co. vs. Adams, 181 U. S., 580.

We have no fault to find, in this connection, with either of the cases cited by the Court of Appeals of Kentucky, but, so far from being conclusive, we believe that they have no bearing whatever on the question. In Kidd vs. Alabama, 188 U. S., 730, this Court, Mr. Justice Holmes delivering the opinion, held that the State of Alabama had the right to classify property and to tax one class and to exempt another. We have no thought of disputing a principle so well established.

As to The Kentucky Railroad Tax Cases, 115 U. S., 321, we respectfully call the Court's attention to the fact that there was involved therein no question as to taxation, as distinct from the preliminary of assessment. There was involved merely the question of procedure, a question as to whether the property of the railroad could be valued as a basis for the subsequent extention of the rate by machinery different from that prescribed for the assessment of other property. Mr. Justice Matthews, delivering the opinion of this Court, said:

> "The right to classify railroad property as a "separate class for purposes of taxation grows "out of the inherent nature of the property and "the discretion vested by the Constitution of the "State in its legislature, and necessarily involves "the right on its part, to devise and carry into "effect a distinct scheme, with different tribunals, "the proceedings to value it. If such a scheme is "due process of law, the details in which it differs "from the mode of valuing other discriptions and "classes of property cannot be considered as a "denial of the equal protection of the laws."

In applying The Kentucky Railroad Tax Cases to the case at bar, the Court of Appeals of Kentucky regarded the question in issue from the wrong point of view. We did not and do not question the right of Kentucky to

adopt the system embraced in Section 4096 for the assessment of the property of railroads. We accept Section 4096 as construed by the Court of Appeals. What we do question, and question most earnestly, is that the State of Kentucky, having by Section 4096 provided for the taxation of railroads on a small proportion of the total value of their cars, can provide by Section 4020 for the taxation of individuals and partnerships and corporations not operating railroads on the total value of all their cars, especially when most of the latter have a taxable situs in other States. We are attacking Section 4020 from the position of those affected by it; we are not attacking Section 4096, as evidently we were supposed by the Court of Appeals to be doing.

The exact and comprehensive definition of classification is elusive; but its broader meaning has been announced in notable cases by many members of this Court. If we might venture a definition, drawn from various enunciations, we would say that in property taxation, excluding personal taxation, classification is the just selection of various classes of property, the establishment of a uniform basis and system of valuation peculiar to each class, and the fixing of a rate peculiar to each class; the result being an equality of burden as among the numerous units composing each class, and equality of burden as among the several classes.

But the classification attempted in Sections 4020 and 4096 does not satisfy the demands of equality. In so far as we are here concerned these divide cars into two classes those owned by railroads companies composing one class, those owned by the individuals or corporations not railroads composing the other. The members of the first class are taxed at a given rate on a small proportion of the total value of their cars; the members of the second class are taxed at the same rate on the total value of their cars. There is equality as among the members of each class; but there is gross inequality as between the classes, for, although the rate is equal, the basis of valuation is different. And inequality is produced as surely by discrimination in valuation as by discrimination in the rate.

In Judson on Taxation, Section 292, it is said:

"It is obvious that inequality in taxation is "effected as surely through difference in valua- "tion of the assessors as difference in the rate of "taxation imposed by law."

Again, in Section 463, it is said:

"It is obvious that, where taxation is upon pro- "perty that requires valuation, inequality of taxa- "tion is produced as surely by inequality of valua- "tion as by inequality of the rate of tax."

To the same effect are:

People vs. Weaver, 100 U. S., 589.
C. B. Q. R. R. Co. vs. Commissioners, 67 Fed., 411.
Taylor vs. L. & N. R. R. Co., 31 C. C. A., 537.
Rialway vs. Guenther, 19 Fed., 398.
Cummings vs. Bank, 101 U. S., 157.

The Fourteenth Amendment was first applied to discriminating State taxation by Mr. Justice Fields, of the Supreme Court of the United States, sitting in the District Court of California, in the case of San Mateo County vs. Southern Pacific Railroad Company, 13 Fed., 145 and 172. The Constitution of California provided that all property, with certain exceptions, was to be taxed in proportion to its value. By the thirteenth article "a mortgage, deed of trust, contract, or other obligation by which a debt is secured" was treated for purposes of assessment and taxation as "an interest in the property affected thereby." Except as to railroads and other *quasi* public corporations, the value of the property affected, less the value of the security, was to be assessed to its owner, while the value of the security was to be assessed to its holder. There was one general rate of taxation. The County of San Mateo sued the Southern Pacific Railroad Company to recover taxes for 1881 and 1882; the defendant raised a question as to the equal protection of the laws. In discussing the question, Mr. Justice Field said, (Page 734):

"The adjudications as to the meaning of the rule "of equality and uniformity to be observed in taxa- "tion, may, therefore, be properly referred to in "construing the requirement of the fourteenth "amendment, when it is invoked with respect to

"burdens imposed by taxation. In Lexington vs. "McQuillans's Heirs, the Supreme Court of Ken- "tucky said that the legislature of the State had "no constitutional authority to exact from one "citizen the entire revenue of the Commonwealth; "and though the distinction between constitution- "al taxation and the taking of private property "for public use by legislation might not be defin- "able with perfect precision, the Court was clear- "ly of the opinion that whenever the property of "a citizen was taken from him by the sovereign will "and appropriated without his consent to the "benefit of the public, the exaction could not be "considered a tax unless similar contributions "were made by the public itself, or rather exacted "by the same public will from such constituent "members of the same community as ow[illegible] the same "kind of property; and that, though there may be "a discrimination in the subjects of taxation, still "persons of the same class, and property of the "same kind, must generally be subjected alike to "the same common burden. 9 Dana (Ky.), 513. "In State vs. Township of Readington, the "Supreme Court of New Jersey said: 'Taxa- "tion operates upon a community, or a class "in a community, according to some rule of "apportionment. When the amount levied upon "individuals is determined without regard to the "amount or value exacted from any other in- "dividual or classes of individuals, the power ex- "ercised is not that of taxation, but of eminent "domain. A tax upon the persons or property of "A., B., and C. individually, whether designated "by name or in any other way, which is in excess "of an equal apportionment among the persons, or "property of the class of persons or kind of pro- "perty subject to taxation, is, to the extent of such "excess, the taking of private property for a public "use without conception. The proces is one of "confiscation, and not of taxation.' 36 N. J. Law, "70.

"As the foundation of all just and equal taxation

"is the assessment of property taxed,—that is, "ascertainment of its value,—in order that the tax "may be levied according some ratio to the value "uniformity of taxation necessarily requires un- "iformity in the mode of assessment as well as in "the rate of taxation; or, to quote the language of "the Supreme Court of Ohio expressing the same "thought: 'Uniformity in taxing implies equality " in the burden of taxation, and this equality of "burden cannot exist without uniformity in the "mode of assessment as well as in the rate of taxa- "tion.' Exchange Bank of Columbus vs. Hines, 3 "Ohio St., 1.

"If we now look at the scheme of taxation pre- "scribed by the Constitution of California for the "property of railroad companies, we shall per- "ceive a flagrant departure from the rule of "equality and uniformity so essential to equality "in the distribution of the burdens of govern- "ment. Whenever an individual holds property "incumbered with mortgage he is assessed at its "value, after deducting from it the amount of the mortgage. If a railroad company hold property "subject to a mortgage, it is assessed at its full "value, without any deduction of the mortgage; "that is, as though the property were unincumber- "ed. The inequality and discriminating character "of the procedure will be apparent by an illustra- "tion given by counsel. Suppose a private person "owns a farm which is valued at $100,000, and is "incumbered with a mortgage amounting to $80,- "000: He is, in that case, assessed at $20,000; if "the rate of taxation be two per cent. he would pay "$400 taxes. If a railroad company owns an ad- "joining tract worth $100,000, which is also in- "cumbered by a mortgage of $80,000, it would be "assessed for $100,000, and be required to pay "$2,000 taxes, or five times as much as the private "person. There is here a discrimination too palp- "able and gross to be questioned, and such is the "nature of the discrimination made against the "Southern Pacific Railroad Company in the taxa-

"tion of its property. Nothing can be clearer "than that the rule of equalty and uniformity is "thus entirely disregarded."

After discussing the case of People vs. Weaver, 100 U. S., 539, the opinion continues:

"It is no answer to this discrimination to say "that property in the State may be divided into "classes, and different rates prescribed for them. "Undoubtedly property may be classified for pur- "poses of taxation. Real property may be subject- "ed to one rate of taxation; personal property to "another rate. Property in particular districts "may be taxed for local purposes, while property "elsewhere may be exempt. Taxation on business "in the form of license may also vary according "to the calling or occupation, and the extent "of business transacted, but even then there "must be uniformity of charges with respect to the "same calling or occupation in the same locality. "It is, however, only with the taxation of property "that we are concerned in this case, and the whole "object of classifying property is that each class "may be subjected to a special rate of taxation. "There is no difference in the rate prescribed by "the law of the State for property of railroad cor- "porations, and the rate prescribed for the prop- "erty of individuals. There is only one rate for "all property. There is, therefore, no case pre- "sented for the application of the doctrine of "classification. The discrimination complained of "arises from the different rule adopted in ascer- "taining the value of the property of railroad "corporations as a basis for taxation, not from "any different rate of taxation when the value is "established. In all taxes upon property whatever "its form or nature, the property is taken as rep- "resenting a pecuniary value, as standing for so "much money invested. The tax is the rate per "centum of this pecuniary value. The value being "ascertained, the law fixes the rate. The ground of "complaint here is that the law requires a higher "value to be placed upon the defendant's property

"than upon the property of individuals similarly "incumbered, or rather requires the assessor of "the defendant's property in estimating its value, "to disregard and set aside certain elements "materially affecting its amount, which are to be "considered in estimating the value of the pro- "perty of the individuals. It is not classifying "property to make this discrimination in deter- "mining its value. It is not classifying property "to provide that the property of certain parties, "which has a mortgage upon it, shall be assessed "at its value after deducting the mortgage; and "that the property of other parties, also having "a mortgage upon it shall be taxed at its full value "without any reduction. That is not providing "for a different rate of taxation for different "kinds of property, but for unequal taxation ac- "cording to the character of the owner."

The same constitutional provision of California was again in question in the group of cases reported under County of Santa Clara vs. Southern Pacific Railroad Company, 18 Fed., 385, where Mr. Justice Field again said:

"The basis of all ad valorem taxation is nec- "essarily the assessment of the property; that is, "the estimate of the value. Whatever affects the "value necessarily increases or diminishes the "tax proportionately. If, therefore, any element "which is taken into consideration in the valuation "of the property of one party, be omitted in the "valuation of the property of another, a dis- "crimination is made against the one, and in favor "of the other, which destroys the uniformity so "essential to all just and equal taxation. Such an "element exists where, in the assessment of prop- "erty subject to a mortgage, the value of the "mortgage is deducted if the property be owned "by a natural person, and is not deducted if owned "by a railroad corporation. And the constitution "of the State declares that, in the ascertainment "of value as the basis of taxation, such deduction "shall be allowed in the one case and denied in

"the other.

"Instances of every-day occurrences will show "the effect of this discrimination in a clear light. "A natural person and a railroad company own "together a parcel of property in equal propor- "tions, subject to mortgage. In estimating the "value of the undivided half belonging to the rail- "road company, no part of the mortgage is de- "ducted. The discrimination is made against the "company, for no other reason than its ownership. "Take another instance: A natural person and a "railroad company own tracts of land adjoining "each other, of the same quality, and of equal "fertility and richness, both being subject to a "mortgage. In the estimate of the value of the "property belonging to the natural person the "amount of the mortgage is deducted; in the esti- "mate of the value of the property belonging to "the railroad company the mortgage is not de- "ducted. Of course, the valuation of the latter, "and consequent tax, is proportionately increased, "and this discrimination is made solely because "of the ownership of the property. Should these "two owners exchange their lands, the valuation "made would change with the ownership. Should "the railroad company sell its tract to an individu- "al, the assessing officers would at once be bound to "return a different valuation of the property as a "basis for taxation. Every one sees that the val- "uation has not in fact changed with the owner- "ship, and therefore that the discrimination is "made solely because a rule is adopted in the "assessment of the property of one party different "form that applied in the assessment of the prop- "erty of the other, purely on account of its "ownership. A corresponding difference in the "tax which the different owners must pay follows "the assessment. Thus, if two adjoining tracts "are subject to a mortgage, each for half its value, "the natural person owning one of them pays a "tax on the other half, while the corporation must "pay a tax on the whole of its tract; that is, double

"the tax of the individual. Thus, if each tract be "worth $100,000, subject to a mortgage of $50,000, "and the rate of taxation be 2 per cent., the tax of the individual will be $1,000; the tax of the cor- "poration will be $2,000. If, then, these owners "should exchange their lands, the property which "this year is thus taxed at $1,000 will next year be "taxed at double the amount, and the other tract "this year taxed at $2,000 will next year be taxed "one-half that sum. The property which is now "half exempt will then be subject to taxation to "its full value, and that which is now taxable at "its full value will then be half exempt; and all "this change in valuation without any change in "the character or use of the property, but solely "on account of the change in its ownership.

"The principle which sanctions the elimination "of one element in assessing the value of property "held by one party, and taking it into considera- "tion in assessing the value of property held by "another party, would sanction the assessment of "the property of one at less than its value,—at a "half or quarter of it,—and the property of an- "other at more than its value,—at double or "treble of it,—according to the will or caprice of "the State. To-day railroad companies are under "its ban, and the discrimination is against their "property. To-morrow it may be that other in- "stitutions will incur its displeasure. If the prop- "erty of railroad companies may be thus "sought out and subjected to discriminating taxa- "tion, so, at the will of the State, by a change of "its constitution, may the property of churches, of "universities, of asylums, of saving banks, of in- "surance companies, of rolling and flouring mill "companies, of mining companies, indeed, of any "corporate companies existing in the State. The "principle which justifies such a discrimination in "assessment and taxation, where one of the "owners is a railroad corporation and the other a "natural person, would also sustain it where both "owners are natural persons. A mere change in

"the State constitution will effect this if the "federal constitution does not forbid it. Any dif-'ference between the owners, whether of age, color, "race, or sex, which the State might designate, "would be a sufficient reason for the discrimina-"tion. It would be a singular comment upon the "weakness and character of our republican in-"stitutions if the valuation and consequent taxa-"tion of property could vary according as the "owner is white, or black, or yellow, or old, or "young, or male, or female. A classification of "values for taxation upon any such ground would "be abhorrent to all notions of equality of right "among men. Strangely, indeed, would the law "sound in case it read that in the assessment and "taxation of property a deduction should be made "for mortgage thereon if the property be owned "by white men or by old men, and not deducted if "owned by black men or young men; deducted if "owned by landsmen, not deducted if owned by "sailors; deducted if owned by married men, not "deducted if owned by bachelors; deducted if "owned by men doing business alone, not deducted "if owned by men doing business in partnerships "or other associations; deducted if owned by trad-"ing corporations, not deducted if owned by "churches or universities; and so on, making a "discrimination whenever there was any differ-"ences in the character or pursuit or condition of "the owner. To levy taxes upon a valuation of "property thus made is of the very essence of "tyranny, and has never been done except by bad "governments in evil times, exercising arbitrary "and despotic power."

In Northern Pacific Railroad Company vs. Walker, 47 Fed., 681, the organic act of the territory of North Dakota provided that the legislative assembly of the territory should not "make any discrimination in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value." The territorial legislature passed an act requiring that in lieu of other taxes railroad companies should pay a cer-

tain percentage on the gross earnings. The Northern Pacific Railroad Company sought to enjoin the collection of the tax on the ground, among others that the legislative act contravened the provisions of the organic law of the Fourteenth Amendment. The Court said:

> "Property of the same kind, in the same condi-
> "tion, and used for the same purpose, must be
> "taxed by a uniform rule without regard to its
> "ownership. The legislature having selected land
> "as a subject of taxation, all lands under the same
> "conditions are subject to be taxed. The law for
> "the taxation of lands must operate equally and
> "uniformly upon all lands, the condition and use
> "of which are similar. While property may be
> "classified for the purpose of taxation, between
> "the subjects of taxation in the same class there
> "must be equality. Property of the same kind, and
> "in the same condition, and used for the same pur-
> "pose, cannot be divided into different classes for
> "purposes of taxation, and taxed by a different
> "rule, because it belongs to different owners. But
> "this is precisely what the act under consideration
> "seeks to do. It exempts the lands of the company
> "from taxation simply and solely because they be-
> "long to the company, and taxes all other lands by
> "uniform rule according to their value. It was
> "not competent for the legislature, either under
> 'the organic act or the fourteenth amendment of
> "the constitution of the United States, to classify
> "the lands in the territory, for purposes of taxa-
> "tion, into lands owned by railroad companies and
> "lands owned by all other persons, and declare that
> "the former should not and the latter should be
> "taxed."

In the cases reported as Russell vs. Croy, 164 Mo., 69, there was involved a constitutional provision of Missouri identical, as far as this particular question is concerned, with the thirteenth section of the California Constitution, from which it was copied. Two persons, holding mortgages on property of individuals, sued to enjoin the collection of the taxes levied on the securities so held by them by virtue of the constitutional provision. Judge

Valliant, delivering the opinion of the Supreme Court of Missouri, quoted from and approved the California cases heretofore referred to. It was held that the complainants, whose mortgages on the property of individuals were taxed, while the holders of mortgages on the property of railroads and other quasi-public corporations were not taxed, were denied the equal protection of the laws. On the subject of classification, the Court said:

> "It is not denied that the State may classify property for taxation. And nothing said herein is "to be understood as drawing in question or casting any doubts as to the validity of Section 5, "Article 10, of our own Constitution, relating to "the taxation of railroad corporations, but we do "mean to say the classification must rest on some "reason other than mere ownership, and that "different pieces of property of the same kind "held and used for the same or similar purposes "within the same jurisdiction, cannot lawfully be "so classified as that one is subject to the tax and "the other exempt merely because one belongs to a "natural person and the other to a corporation "or that one is the obligation of a corporation and "the other that of a natural person, or one that of "large concern and the other that of a small one."

The Constitution of Tennessee contained the following provision:

> "All property shall be taxed according to its "value, that value to be ascertained in such "manner as the legislature shall direct, so that "taxes shall be equal and uniform throughout "the State. No one species of property from "which a tax may be collected shall be taxed "higher than any other species of property of the "same value."

The statutes of the State provided for the assessment of the property of railroad and telephone companies, the basis of valuation prescribed for their properties being relatively higher than the basis upon which other property was assessed. Suit was brought to restrain proceedings, and in these cases, Railroad & Telephone Cos. vs. Board of Equalizers of Tennessee, 85 Fed., 302, Judge

Clarke, of the United States Circuit Court, said, in granting a temporary injunction:

> "I conclude that the plaintiffs have made out a "probable or prima facie right to relief, both on "the ground of constitutionally prohibited in- "equality in the rate of assessment applied to this "property, and also in regard to certain lines or "divisions,—a strongly—probable overvaluation "of the property, considered in and of itself, re- "gardless of any constitutional ratio or propor- "tion. My opinion is that the plaintiffs, on the facts, "are entitled to a judicial investigation, and are "entitled to know the actual processes by which "their property has been assessed at a value so "out of proportion to that of former years. It "may be very true that properties of this kind "have not been adequately assessed heretofore, "and that such properties are not bearing a just "proportion of the government burden of taxation. "If this be true, it does not justify the application "to this case of property of methods that do vio- "lence to the constitution and the settled custom "in our tax system. An unequal and unjust taxa- "tion is no longer a tax, but confiscation."

In Nashville, Chattanooga & St. Louis Railroad Company vs. Taylor, 86 Fed., 168, the railroad sued to enjoin proceedings under the same revenue laws of Tennessee involved in this case just cited, claiming that by reason of certain provisions railroads were denied certain rights accorded to other corporations and individuals and their property, in consequence, assessed at from 25 to 40 per cent. more in proportion to value than other classes of property in the State. Judge Clarke said, (page 187):

> "The organic law of Tennessee has brought every "citizen in the State into one constitutional class "for the purpose of taxation, and provided that "taxes shall be assessed and levied on value only as "the basis, and at a rate equal and uniform in "proportion to value. It is not competent, under "the form of classification, to divide up this class "and violate the constitution. If the State has,

"then, by its own constitution, guaranteed certain "rights to all of its citizens alike, without discrim- "ination, what just or valid objection can be offer- "ed to a restraint which deprives the State of the "power to deny to a class of citizens the equal pro- "tection thus afforded? * * * * Certainly "the State is left free to apply different methods "of ascertaining value, and indifferent methods "and remedies for the collection of taxes when "properly assessed. For these purposes, the "differences in the nature and use of property "may be taken into account; but all questions of "this character relate to methods of procedure, "and not the fundamental right involved. It will "be observed by the reading of the provisions of "the State Constitution, in relation to the power "of taxation, that the principle of equality and "uniformity is declared in this language: 'No "one species of property from which a tax may "be collected shall be taxed higher than any other "species of property of the same value.' Const. "Tenn. art. S. 28. But the constitution contains "a like limitation on any method of procedure "which may be adopted by the State in the ex- "ercise of its power, for it further provides: 'All "property shall be taxed according to its value to "be ascertained in such manner as the legislature "shall direct, so that taxes shall be equal and uni- "form throughout the State.' Id. The legisla- "ture is not left with an unlimited or untrammeled "power in the method of procedure adopted to "ascertain value, but is under a mandatory in- "junction to ascertain or fix this value, 'so that "taxes shall be equal and uniform throughout the "State.'"

We do not question here any of the numerous decisions of this Court upholding classification. In all of the many cases, in which those decision were rendered, the facts were not sufficient to show unjust discrimination. But we do not find a case that has had this Court's attention which presents the peculiar features of the one now under consideration. Without discussing those cases in detail,

it is sufficient to say broadly that in each of them there was involved a claim by one of a distinct class of unjust discrimination against it in favor of one of another distinct class. We wish to refer to the case of Pacific Express Co. vs. Seibert, 142 U. S., 339, because of a significant expression in the opinion. A statute of Missouri required persons or corporations who carried on the business of transportation "on contracts for hire with railroad or steamboat companies," doing business within the State, to pay a certain tax on the franchise, on the privilege of doing business, while such express companies as owned their own mediums of transportation were not subject to tax. At first blush, this appears to have been a classification based solely upon ownership; but Mr. Justice Lamar, delivering the opinion of this Court, drew a clear distinction:

> "There is an essential difference between Com-
> "panies defined by the Act, and railroads or steam-
> "boat companies that own their own mean of tran-
> "portation. The vital distinction is this: Rail-
> "road companies pay taxes on their railroads,
> "rolling stock, and other tangible property, as well
> "as, generally, upon their franchises; and steam-
> "boat companies likewise pay a tax upon their
> "tangible property. * * * * On the
> "other hand, the express companies, such as are
> "defined by this Act, have no tangible property,
> "of any consequence, subject to taxation under
> "the general laws. There is, therefore, no way in
> "which they can be taxed at all unless by a tax up-
> "on their receipts for business transacted. This
> "distinction clearly places express companies
> "defined by this Act in a separate class from com-
> "panies owning their own means of transporta-
> "tion.

We omitted from this excerpt the following significant sentence that we may now more forcefully call attention to it:

> "This tax is not necessarily an ad valorem tax
> "at the same rate as is paid on other private prop-
> "erty in the State belonging to individuals."

The significance of this language necessarily is that

had the tax been "an ad valorem tax at the same rate" that fact would have had some material bearing.

In the case at bar we are dealing with "an ad valorem tax at the same rate" on all property. We are dealing with tangible property of the same kind, railroad cars, used for similar purposes, in the one case the owner thereof not owning track and motive power while in the other case the owner does own tracks and power.

In the able opinion rendered in this case on demurrer by the learned Judged of the Jefferson County Court, (23) after commenting upon the imparative demand of the Constitution of Kentucky for uniformity and equality, he said:

> "This limitation upon the taxing power not only "denies the right to fix different pieces or classes "of property, but just as effectively and emphat- "ically prohibited a different basis of valuation "for one, than that employed for the other, or the "taxation of one in whole and the other in part. "A uniform tax rate does not secure uniformity "of taxation, where one class of property pays "upon a valuation equal to 100 per cent. of its "actual value and another class upon fifty per cent. "of such valuation, or when one class of individu- "als is assessed for all and another for half of its "property. A tax rate of fifty cents upon the one "and twenty-five cents upon the other, would se- "cure precisely the same degree of uniformity, "and would be equally defensible. To tax the en- "tire rolling stock of the defendant under section "4020, notwithstanding only a small portion of it "has had an actual situs in Kentucky, and to tax "similar property with precisely the same situs "used in the same way and for the same purpose "according to the mileage rule under section 4096, "merely because it is the property of a railroad, "does violence to every idea or sentiment of un- "iformity, equality and justice. Such a policy, if "carried out on a broad scale, would breed anarchy "and incite revolution.
>
> "Section 182 of the Constitution and the inter- "pretation placed upon it by the Supreme Court

"in the Kentucky railroad cases, 115 U. S., 321, as "this Court understands them, do not in any sense "justify such gross inequality. Section 182 recog- "nizing the peculiar difficulties to be incurred in "arriving at the value of railroads and railroad "property, and in the collection of taxes distribut- "ed over so much territory and throughout so "many local taxing districts, relaxed the rule of "uniformity as to the manner or method of assess- "ment and collection of taxes, and no further. It "cannot, for an instant, be contended that it au- "thorized a different rate or a different standard "of valuation, and with no more force can it be "contended that the property of a railroad was to "be exempt from taxation, where the property of "an individual or other corporation of a similar "nature and similarly situated was to be taxed.

* * * * *

"It will be observed that section 182 of the Con- "situation applies not only to railroads, but also to "'railroad property.' 'Railroad property' does "not necessarily mean property belonging to a "railroad. The term is just as applicable to prop- "erty used in connection with railroads, and for "railroad purposes. Defendant's rolling stock "and that of numerous corporations which are not "railroad companies, is none the less 'railroad "property.'"

We are unable to see any material difference between the California Railroad Cases, 13 Fed., 145, and 18 Fed., 385, and the case at bar. In the former the State declared that railroads should pay taxes on the total valuation of their property while other property owners should pay on the total value less the value of mortgages. In the case at bar the State declares that a car company shall pay taxes on the total value of all its cars while railroads shall pay only the proportion of their user in the State. If it is unlawful discrimination in one case, it is equally so in the other. Nor are we able to see that the attempted classification by the Kentucky statutes is based on any reason other than the difference in ownership. If the State may make this distinction, it may with equal right

say that all property belonging to white persons shall be assessed while only a part of the property of colored persons shall be assessed or it may make any equally arbitrary discrimination.

The Constitution of Kentucky provides for uniformity of taxation. No one will contend that Section 182 was designed to exempt the taxation of railroads from the necessity of this uniformity..

While a different method of assessment is allowable, such methods may not disguise the exclusion of part of the property of a railroad and the inclusion of all of a similar property of a car company.

In conclusion we submit that we have shown that Section 4020, Kentucky statutes, as applied by the Court of Appeals of Kentucky, deprives the plaintiff in error of the protection guaranteed by the Fourteenth Amendment, in that it is taxed on its cars beyond the jurisdiction of Kentucky and on a basis of valuation relatively greater than the basis upon which the cars of railroads are valued.

The various attitudes assumed by Kentucky toward various property owners are grossly inconsistent.

By Section 4020 it seeks to tax persons and corporations domiciled within its limits, on all their tangible personal property although that property may be actually located in other States. From the standpoint of abstract justice, this is logically equivalent to the assertion by Kentucky that all personal property wherever located is to be taxed in the State of the owner's domicile. Yet in the same statute, Kentucky seeks to tax the tangible personal property of non-residents because it is within her limits. This is equivalent to saying that all personal property is to be taxed by that jurisdiction in which it is located and by which it is protected.

In the valuation of the capital stock of public service corporations whose property is diffused throughout the various States, Kentucky has taken advantage of the rule announced by this Court, that the entire value of the capital stock may be considered in fixing the value of that portion employed within the State. (Kentucky Statutes 4077, 4079, 4080 and 4081.) A cruel resemblance exists between the State of Kentucky and that "bandit

with a pistol at the throat of every property owner" denounced in such unmeasured terms, in Delaware, Lackawanna & Western R. R. C. vs. Commonwealth, 145 Pa. St., 96, by the Supreme Court of Pennsylvania.

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APPENDIX.

CONSTITUTION OF KENTUCKY.

Sec. 171. "The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

Sec. 172. "All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair valuntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of mesfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law."

Sec. 174. "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation

paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises.'

Sec. 182. "Nothing in this Constitution shall be construed to prevent the General Assembly from providing, by law, how railroads and railroad property shall be assessed and how taxes thereon shall be collected. And, until otherwise provided, the present law on said subject shall remain in force."

Sec. 212. "The rolling stock and other movable property belonging to any railroad corporation or company in this State shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals. The earnings of any railroad company or corporation, and choses in action, money and personal property of all kinds belonging to it, in the hands, or under the control, of any officer, agent or employe of such corporation or company, shall be subject to process of attachment to the same extent, and in the same manner, as like property of individuals when in the hands or under the control of other persons. Any such earnings, choses in action, money or other personal property may be subjected to the payment of any judgment against such corporation or company, in the same manner and to the same extent as such property of individual in the hands of third persons."

KENTUCKY STATUTES.

Sec. 4020. "All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempt from taxation by the Constitution and shall be assessed at its fair cash value, estimated at the price it would bring at a fair vaolutary sale."

Sec. 4077. "Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation and Assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in Section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how proportioned, where more than one jurisdiction is entitled to a share of such tax shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require."

Sec. 4079. "Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the

statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: Provided, That said board, from said statement, and from such other evidence, as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid."

Sec. 4080. "If the corporation, company or association be organized under the laws of any other State or government, except as provided in the next section, the board shall fix the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State."

Sec. 4081. "If the corporation organized under the

laws of this State or of some other State government be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair-car company, the lines of which extend beyond the limits of the State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through, or into which, such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this State."

Sec. 4096. "That the president or chief officer of each railroad company ,or other corporation owning or operating a railroad lying in whole or in part in this State, shall, on or before the first of September in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, incorporated town and taxing districts therein, together with the average value per mile thereof, and in the respective counties, cities, incorporated towns and taxing districts therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars, and a list of the depot grounds and improvements, and other real estate of the said company and the value thereof, and the respective counties, cities and incorporated towns in which the same are located. That if any of said railroad companies own or operate a railroad or railroads out of this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad in this State bears to the whole number of miles operated by said company in

and out of this State. Said report shall be made as of the first day of July, and a failure to file said report by the first day of September shall subject the president or chief officer residing in this State to a fine of one thousand dollars, and fifty dollars for every day after the first day of September that he fails to file said report, to be recovered as indicated by section 4104 of this article."

Sec. 4098. "The Auditor shall lay before the Railroad Commission, on or before the first day of October, the returns made to him under this act, and any schedules and valuations he may have made under the second section of this article. And should the valuations, or any of them, in the judgment of said board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said board shall keep a record of their proceedings, to be signed by each member present at any meeting, and the said board is hereby authorized to examine the books and property of any railroad company to ascertain the value of its property, or to have them examined by any suitable disinterested person, to be appointed by them for that purpose."

Sec. 4102. "The same rate of taxation for State purposes which is or may be in any year levied on other real estate, shall be, and is hereby, leveid upon the value, so found by said board, of the railroad, rolling stock and real estate of each company; and the same rate of taxation for the purposes of each city, town, part of a county or tax district of any kind, in which any portion of any railroad is located, which is, or may be, in any year levied on other real estate of said company therein, and of the number of miles of said railroad, therein, reckoned as of the value of the average of each mile of such railroad, with its rolling stock, as ascertained as aforesaid: Provided, That railroad bridges spanning any river, which constitutes the boundary or State line of the Commonwealth, shall be assessed as of the counties in which they are located, and local tax derived thereform shall be applied to each city, town, county or tax district in which said bridges are or may be located; and im-

Sec. 4241. It shall be the duty of the sheriff or auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted, by the assessor, board of supervisors, board of valuation and assessment or railroad commission, for any year or years. The officer proposing to have such property assessed shall file in the clerk's office of the county in which the property may be liable to assessment a statement containing a description and value of the property proposed to be assessed, and the value of the corporate franchise, if any, and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed. Within five days after the filing of such statement, the clerk of the court shall issue a summons against the owner to show cause before the next regular term of the county court, which does not commence within five days after service of such summons, why such property or corporate franchise, if any, shall not be assessed at the value named in the statement filed. The summons shall be executed by the sheriff of the county delivering a copy thereof to the owner, if in the county, if not, then to his agent, attorney or person in possession of the property. At the next regular term of the county court after the notice has been served five days, if it shall appear to the court that the property is liable for taxation, and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as is required by law; if not liable, he shall make an order to that effect. From so much of the order of the court deciding whether or not the property is liable to assessment, either party may appeal as in other civil cases, except that no appeal bond shall be required where the court decides that the property is not liable to assessment or taxation. If the court shall decide that the property is liable to assessment, the clerk of the county court shall certify to the Auditor of Public Accounts and the sheriff a description of the property and the amount of the assess-

ment for taxation, together with the amount of penalty and cost of assessment. All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of the taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof. The taxes and penalties shall be collected and accounted for as other taxes and penalties are required to be collected. As compensation for his services in causing such property to be assessed, the officer filing the statement shall be entitled to the penalty, which shall be paid to him after the full amount of taxes shall have been collected. The county clerk shall enter all such assessments in a book to be kept for that purpose, showing the date of the assessment, the name of the person against whom the assessment is made, the location and quantity of the property assessed, the value fixed thereon; and the officer collecting the tax shall, when the same is paid, notify the clerk of the payment, which payment shall be noted by the clerk opposite the entry of such assessment.

mediately after said board shall have completed its valuations each year, the Auditor of Public Accounts shall notify the clerk of each County Court of the amount so assessed for taxation in his county, and each railroad company of the amount of its assessment for taxation for State purposes and for the purposes of such city, town, county, part of county and tax district."

AUTHORITIES CITED.

Section 4020, Kentucky Statutes, Violates the Fourteenth Amendment; because:

1. The Legislature of Kentucky Had No Power To Authorize The Assessment Of Tangible Personal Property Which Has Acquired a Taxable Situs Outside The Territorial Limits Of The State:

Western Union Telegraph Co. vs. Taggart, 154 U. S., 439.
Adams Express Co. vs. Ohio, 165 U. S., 194.
Adams Express Co. vs. Kentucky, 166 U. S., 172.
Hays vs. Pacific Mail &c. Co., 17 How., 596.
Morgan vs. Parham, 16 Wall., 471.
St. Louis vs. Ferry Co., 11 Wall., 423.
Gloucester Ferry Co. vs. Pennsylvania, 144 U. S., 196.
Old Dominian Steamship Co. vs. Virginia, 25 S. C. R., 687.
State Tax on Foreign Held Bonds, 15 Wall., 300.
Blackstone vs. Miller, 188 U. S., 212.
Coe vs. Errol, 166 U. S., 524.
Diamond Match Co. vs. Ontonagon, 188 U. S., 96.
Brown vs. Houston, 144 U. S., 622.
Pittsburg Coal Co. vs. Bates, 156 U. S., 577.
New Orleans vs. Stempel, 175 U. S., 309.
Bristol vs. Washington Co., 177 U. S., 145.
Pullman Palace Car Co. vs. Pennsylvania, 141 U. S., 22.
American Refrigerator Transit Co. vs. Hall, 174 U. S., 70.
Union Refrigerator Transit Co. vs. Lynch, 177 U. S., 149.
Billings vs. Illinois, 188 U. S., 104.
Kelly vs. Rhoads, 188 U. S., 1.
Louisville & Jeffersonville Ferry Co. vs. Kentucky, 188 U. S., 399.

Delaware &c. R. R. Co. vs. Commonwealth, 25 S. C. R., 669.
1. Cooley, Taxation (3 Ed.), 84, 249, 2, 22, 27.
Rorer, Interstate Law, 204.
State vs. Falkenbridge, 3 Green (N. J.) 320.
Wilkey vs. Pekin, 19 Ill., 160.
People vs. Commissioners, 35 N. Y., 441.
Pullman vs. Twombley, 29 Fed., 658.
Baldwin vs. Shine, 84 Ky., 502.
Delaware, L. & W. R. R. Co. vs. Pennsylvania, 198 U. S., 341.
Marye vs. Baltimore & O. R. R. Co., 127 U. S., 117.
American Dredging Co. vs. Pennsylvania, 122 Pa., 386.

2. Section 4020, Kentucky Statutes, As Applied By The Court of Appeals of Kentucky, Denies The Plaintiff In Error That Protection Of The Laws Afforded Railroads By Section 4096:

Constitution of Kentucky, 171, 172, 174, 182, 212.
Levi vs. Louisville, 97 Ky., 394.
Kentucky Statutes, 814, 1839, 1882, 1883, 4019, 4020, 4077, 4079, 4080, 4081, 4096, 4102.
The Kentucky Railroad Tax Cases, 115 U. S., 321.
Union Refrigerator Transit Co. vs. Hall, 174 U. S., 70.
Pullman's Palace Car Co. vs. Pennsylvania, 141 U. S., 22.
Kidd vs. Doull, 133 U. S., 266.
Conelan vs. Doull, 133 U. S., 266.
Bank vs. County, 166 U. S., 440.
Yazoo & M. V. Co. vs. Adams, 181 U. S., 580.
Judson, Taxation, 292, 463.
People vs. Weaver, 100 U. S., 589.
C. B. & Q. Co. vs. Commissioners, 31 C. C. A., 537.
Railway vs. Guenther, 19 Fed., 398.
Cummings vs. Bank, 101 U. S., 157.
San Mateo County vs. Southern Pacific Ry. Co., 13 Fed., 145, 172.

Lexington vs. McQuillian's Heirs, 9 Dana (Ky), 513.
State vs. Readington, 36 N. J. L., 70.
Exchange Bank vs. Hines, 3 Ohio St., 1.
Santa Clara County vs. Southern Pacific Ry. Co., 18 Fed., 385.
Northern Pacific Ry. Co. vs. Walker, 47 Fed., 381.
Russell vs. Croy, 164 Mo., 69.
Railroad & Telephone Co. vs. Board, 85 Fed., 302.
Nashville &c. Co. vs. Taylor, 86 Fed., 168.
Pacific Express Co. vs. Seibert, 142 U. S., 339.

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FILED
MAR 27 1905
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 347. 814.

UNION REFRIGERATOR TRANSIT CO., . . Plaintiff in Error,

vs.

COMMONWEALTH OF KENTUCKY, BY WM. L. WELLER, JR., REVENUE AGENT, ... Defendant in Error.

ERROR TO THE COURT OF APPEALS OF KENTUCKY.

NOTICE, MOTION, AND BRIEF BY DEFENDANT IN ERROR TO ADVANCE FOR HEARING.

HENRY L. STONE,
SAMUEL B. KIRBY,
ROBERT W. BINGHAM,
Counsel for Defendant in Error.

F. C. RUNNEMACHER PRESS, LOUISVILLE, KY.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 347.

UNION REFRIGERATOR TRANSIT COMPANY, - - - - *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY, BY WM. L. WELLER, JR., REVENUE AGENT, - - *Defendant in Error.*

ERROR TO THE COURT OF APPEALS OF KENTUCKY.

NOTICE.

To Messrs. Humphrey, Hines & Humphrey, and Messrs. Forcht & Field, Attorneys for Plaintiff in Error:

Please take notice that we shall make a motion for defendant in error in the above styled case before the court at the opening of its session on Monday, April 3, 1905, or as soon thereafter as counsel can be heard, to advance the above styled case for hearing at such time as the court may direct, and in support of said motion, will file and present to the court at the hearing of said motion, the grounds therefor, a copy of which motion and grounds is herewith served upon upon you, dated March 17, 1905.

HENRY L. STONE,
SAMUEL B. KIRBY,
ROBERT W. BINGHAM,
Counsel for Defendant in Error.

Service of above notice accepted this March 18, 1904.

ALEX. POPE HUMPHREY,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 347.

UNION REFRIGERATOR TRANSIT COMPANY, - - - - *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY, BY WM. L. WELLER, JR., REVENUE AGENT, - - *Defendant in Error.*

MOTION BY DEFENDANT IN ERROR TO ADVANCE FOR HEARING.

And now comes the defendant in error and moves the court to advance this case for hearing on the following grounds:

1. The State, or Commonwealth of Kentucky, is a party, being the defendant in error. (Sec. 949, U. S. Compiled Statutes.)

2. The execution of the revenue laws of the State of Kentucky has been stayed by the execution of a supersedeas bond by the plaintiff in error herein, under which laws the defendant in error is entitled, according to the judgment of the Court of Appeals of Kentucky herein, to State and county taxes on the taxable property of the plaintiff in error, assessed at $400,000 in each year for four years, which taxes amount to about $15,000. (Sec. 949, U. S. Compiled Statutes, Act June 30, 1870.)

HENRY L. STONE,
SAMUEL B. KIRBY,
ROBERT W. BINGHAM,
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 347.

UNION REFRIGERATOR TRANSIT COMPANY, - - - - - *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY, BY WM. L. WELLER, JR., REVENUE AGENT, - - *Defendant in Error.*

ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO ADVANCE FOR HEARING.

The writ of error in this case, issued to the Court of Appeals of Kentucky, to review a judgment of that court holding that the plaintiff in error, Union Refrigerator Transit Company, a corporation organized under the laws of the Commonwealth of Kentucky, having its home office in Crescent Hill, Jefferson County, in that State, and its principal place of business in the city of St. Louis, in the State of Missouri, was liable to assessment for State and county taxes on its personal property, consisting of 2,000 refrigerator cars, at an assessment of $200 each, for a period of four years. The said taxes amount to about $15,000. This proceeding was instituted by the revenue agent of Jefferson County under Section 4241, Kentucky Statutes, 1903, for the purpose of forcing the plaintiff in error to list

its cars for such taxation. This was resisted by the plaintiff in error before the County Court, with the result that a judgment was rendered requiring it to list such a proportion of its cars as, under a system of averages, were shown to be used in the State of Kentucky during each fiscal year. The remainder were held not to be subject to taxation in Kentucky. From this judgment the defendant in error, Commonwealth of Kentucky, appealed to the Jefferson Circuit Court, where the judgment of the County Court was affirmed. To reverse these judgments, an appeal was prosecuted to the Court of Appeals of Kentucky. In that court the judgments of the courts below were reversed, with direction that the 2,000 cars of the plaintiff in error be assessed at $200 per car, or $400,000 per annum for the four years in controversy. (*Commonwealth vs. Union Refrigerator Transit Company, 80 S. W. Rep. 490; 26 Ky. L. R. 23.*) The plaintiff in error claims that by this judgment it is deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. This proceeding has been in court already nearly three years. By a supersedeas bond the plaintiff in error has stayed the execution of the revenue laws of the State (Section 4020, Kentucky Statutes, 1903), as construed and announced by the Court of Appeals of Kentucky in its judgment herein, May 5, 1904.

Under Section 949, United States Compiled Statutes, Act June 30, 1870, it is insisted that this case should be advanced for hearing in this court upon the grounds set forth in the motion made for that purpose by the defendant in error.

All of which is respectfully submitted.

HENRY L. STONE,
SAMUEL B. KIRBY,
ROBERT W. BINGHAM,
Counsel for Defendant in Error.

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FILED
SEP 20 1905
JAMES H. MCKENNEY,
Clerk

SUPREME COURT of the UNITED STATES.

October Term, 1905.

No. 84.

UNION REFRIGERATOR TRANSIT CO., - PLAINTIFF IN ERROR,

VERSUS

COMMONWEALTH OF KENTUCKY, BY WILLIAM L. WELLER, JR., REVENUE AGENT FOR JEFFERSON COUNTY, - DEFENDANT IN ERROR.

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR DEFENDANT IN ERROR.

Section 4020, Kentucky Statutes, is as follows:

"All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

Under this section the Court of Appeals of the State of Kentucky correctly held that all the tangible personal property (consisting of 2,000 refrigerator cars) of the plaintiff in error, a domestic corporation having its domicile in Jefferson County, in that State, is subject to taxation in that State and county, whether said cars are in or out of that State, and although a portion thereof, under the statutes of some of the other States, is taxable therein; and that said section, in so far as it provides for such taxation in the State of Kentucky of tangible personal property out of that State, owned by individual residents and domestic corporations of that State, does not violate the Fourteenth Amendment to the Constitution of the United States.

HENRY L. STONE,
SAMUEL B. KIRBY,
ROBERT W. BINGHAM,
Counsel for Defendant in Error.

F. C. HUSENACKER PRESS, LOUISVILLE, KY.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 84.

UNION REFRIGERATOR TRANSIT COMPANY - *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY, BY WM. L. WELLER, JR., REVENUE AGENT FOR JEFFERSON COUNTY - - - - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The statement in this proceeding was filed by the defendant in error in the Jefferson County Court, State of Kentucky, June 6, 1902, under the provisions of Section 4241, providing for the retrospective assessment of property omitted from taxation. (R., 3-4.)

To this statement the plaintiff in error, having been duly summoned, filed its answer containing fifteen paragraphs (R., 7-14), and subsequently its supplemental answer (R., 16). To certain paragraphs of these pleadings the defendant in error filed demurrers (R., 15-17), which were in part sustained and in part overruled, as set forth in an elaborate opinion by the judge of the County Court, which will be found copied into the record. (R., 17-26.) The appellant thereupon filed a reply to the paragraphs to which the demurrer was overruled. (R., 27-30.) Subsequently so much of the order sustaining the demurrer to that paragraph of the answer which pleaded limitation against this proceeding to coerce assessments of the property of the plaintiff in error which should have been made as long as five years or more before the institution of this proceeding, was set aside, and the demurrer thereto overruled. (R., 30.) Plaintiff in error filed a rejoinder merely controverting the value claimed

by defendant in error upon each of the cars of plaintiff in error (R., 31), and afterward defendant in error took the deposition of S. P. Vickroy, comptroller of the plaintiff in error, in the City of St. Louis (R., 32-52), and filed copies of the original and amended articles of incorporation of plaintiff in error, recorded in the Jefferson County Court, State of Kentucky (R., 53-57), and on this evidence alone, and the pleadings, the action was tried out in the County Court, and resulted in a finding of facts and judgment, May 14, 1903, in substance as follows (R., 57-59):

1. That the defendant was the owner of 2000 cars on September 15, 1897, of a like number on September 15, 1898, of a like number on September 15, 1899, and a like number on September 15, 1900.

2. That said cars were worth $200 each at the times stated.

3. That said cars were employed by the defendant by renting them to divers and sundry shippers who took possession of the same from time to time at Milwaukee, Wisconsin, and used them for the carriage of freight over divers and sundry railroads in the United States, Canada and Mexico, the defendant being paid by the railroads in accordance with the mileage made by said cars over their said lines.

4. That the correct method of ascertaining the number of cars which should be assessed for taxation in Jefferson County, Kentucky, for each of said years is to ascertain the amount of earnings made by any and all of said cars upon any line of railroad wholly or partly in that State, to apportion the earnings made on lines which are partly within and partly out of Kentucky according to the mileage of said cars in and out of Kentucky, and by this means ascertain the gross earnings made by the defendant upon all its cars in Kentucky, then find the total amount of gross earnings made by the defendant and divide these gross earnings by the total number of cars to show the amount of gross earnings made by each car, then divide the total gross earnings in Kentucky by the gross earnings made by each car, and following this method the court found there were subject to assessment in Jefferson County, Kentucky, as of September 15, 1897, 28 cars; September 15, 1898, 29 cars; September 15, 1899, 40 cars; September 15, 1900, 67 cars.

5. That the proper assessment to be made against the defendant as of September 15, 1897, was $5,600, that is to say, $200 per car for 28 cars; September 15, 1898, $5,800 on a like valuation for 29 cars; September 15, 1899, $8,000 on a like valuation for 40 cars; and September 15, 1900, $13,400 on a like valuation for 67 cars.

6. That the defendant owed State and county taxes on the assessments for said years as follows: 1898, $51.80; 1899, $37.58; 1900, $50.00; 1901, $102.51; and penalties, being 20 per cent. on the amounts of said taxes for State and county purposes,

for 1898, $10.36; 1899, $7.50; 1900, $10.00; 1901, $20.50; and the clerk was directed to enter said assessments and to certify the same as directed by Section 4241, Kentucky Statutes.

7. The court found that the defendant was not liable for assessments for any years other than those mentioned herein.

8. The court found that the cars of the defendant other than those herein mentioned were not liable to assessment for any of said years.

To so much of this judgment as decided that cars other than those mentioned therein were not liable to assessment, defendant in error prayed an appeal to the Circuit Court, which was granted.

A bill of exceptions was signed by the court and made part of the record. (R., 58.) This bill of exceptions thus filed will be found copied in the transcript. (R., 35-58.) It embraces simply the deposition of said Vickroy, and the original articles of incorporation of the appellee company recorded in the Jefferson County Court clerk's office, January 2, 1890, the amended articles of incorporation changing the original corporate name from that of "The Polar Equipment and Transit Company" to that of the plaintiff in error, May 27, 1890, and the amended articles of incorporation of March 14, 1902, changing the principal office of the appellee from the City of Louisville, in Jefferson County, to the City of Crescent Hill, in Jefferson County, Kentucky.

The original statement of defendant in error proceeds upon the theory that the personal property of plaintiff in error is by law assessable for any year in which an assessment of the same had been omitted, and that there was no limitation against such assessment. This court having in *Chicago, St. Louis & New Orleans Railway Co. vs. Commonwealth, 115 Ky. 278*, held that the statute of limitations of five years barred a proceeding to coerce assessments of property omitted from taxation longer than five years before the proceeding is instituted in the County Court, defendant in error did not claim in the Circuit Court that an assessment against the personal property of plaintiff in error could be coerced for State and county taxes prior to the year 1898, and the years fixed by the County Court are conceded to be correct, to wit: 1898, 1899, 1900 and 1901, and the taxes for these four years are all that are in controversy.

Furthermore, there is no dispute between the parties concerning the number or value of the cars owned by plaintiff in error on each of the assessment days for said four years, to wit: September 15, 1897, 1898, 1899, and 1900. In other words, the proof showing the facts as adjudged is not controverted. Neither party makes any question of the fact that plaintiff in error was the owner of 2,000 cars on each of said dates, and that each of them was worth then $200, or a total of $400,000 at each of said dates.

Defendant in error, however, on the appeal to the Circuit Court insisted that the amount of the assessments by the County Court for each of said four years for State and county taxes should have been, on the admitted and adjudged facts, $400,000, instead of the assessment as fixed in the judgment of said court, and that the County Court adopted a basis of assessing the personal property of the plaintiff in error not authorized or directed by any statute of the State of Kentucky.

No real estate owned by the plaintiff in error was sought to be assessed, nor was the intangible property or franchise of the plaintiff in error involved in this proceeding. The only property sought to be coercively assessed by this proceeding is the *tangible personal property* owned by plaintiff in error, consisting of its 2,000 refrigerator cars, in each of the four years mentioned.

The Circuit Court, on November 14, 1903, without filing any written opinion, simply affirmed the judgment of the County Court, which was re-entered in the Circuit Court in substantially the same form as it had been in the County Court. (R., 62-63.) To this judgment defendant in error excepted and prayed an appeal to the Court of Appeals of Kentucky which was granted.

The latter court, after having fully heard the parties by oral argument and brief, reversed the judgment of the Circuit Court in an elaborate opinion delivered by Judge Barker, May 15, 1904, which sustained the contentions made in behalf of the defendant in error in all respects. This opinion is copied into the record (R., 67-73) and is to be officially reported (26 Ky. Law Reporter, 23-28; 80 S. W. 490). It has been printed in an appendix to this brief. Plaintiff in error filed a petition for rehearing (R., 73-74), to which defendant in error filed a response (R., 74-75). The court overruled the petition for rehearing, and, as the record showed, without contradiction, that the plaintiff in error owned 2,000 refrigerator cars of the value of $200 each on the assessment day of each year for which they were sought to be assessed and taxed, the original opinion of the court was extended so as to require the lower court, upon the return of the case, to enter a judgment against plaintiff in error for the amounts due upon said property for taxes for the years mentioned at the legal rate of taxation for each year, with legal penalties. (R., 76.)

Thereupon plaintiff in error filed its assignments of errors, claiming, in substance, that Section 4020, Kentucky Statutes, under the decision of the Court of Appeals of Kentucky holding its said tangible property out of the State of Kentucky subject to taxation or assessment by that State, is in violation of the Fourteenth Amendment to the Constitution of the United States, because it deprives it of its property without due process of law, and denies it the equal protection of the laws. (R., 76-77.) Subsequently a writ of error from this court was allowed, citation accepted by counsel for defendant in error, and a supersedeas bond executed by plaintiff in error. (R., 77-81.)

I.

PLAINTIFF IN ERROR IS LIABLE TO TAXATION IN THE COUNTY OF JEFFERSON, STATE OF KENTUCKY, THE PLACE OF ITS DOMICILE, ON ALL OF ITS TANGIBLE PERSONAL PROPERTY.

While the statement of the defendant in error went for a coercive assessment on the intangible property of the plaintiff in error, that is to say, its franchise, it developed upon the trial in the County Court that it had paid a small sum each year, as taxes to the State only, on the assessment of its franchise by the Board of Valuation and Assessment, and therefore there could be no further assessment of its intangible property or franchise for the years involved herein. (See tax statement made an exhibit with Vickroy's deposition. R., 59.) In other words, the only property in controversy in this case, as above stated, is the *tangible personal property* of plaintiff in error, and it is contended by defendant in error that all of said property is assessable and subject to taxation in Jefferson County, State of Kentucky, for State and county taxes for the four years mentioned. This is settled by Section 4020, Kentucky Statutes, which is as follows:

"All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

It matters not what the law was prior to the enactment of this section (which is a part of the General Revenue Act of November 11, 1892, re-enacted by Section 2, Article 1, of the General Revenue Act of March 29, 1902, Sess. Acts 1902, p. 283, Carroll's Kentucky Statutes, Ed. 1903), since its enactment it has unquestionably been the law in the State of Kentucky that all personal estate of persons residing in that State, and of all corporations organized under the laws of that State, "whether the property be in or out of this State," including intangible property, is subject to taxation, unless the same be exempt from taxation by Section 170 of the State Constitution, and must be assessed at its fair cash value estimated at the price it would bring at a fair voluntary sale.

The only serious question in this case is, then, What is the situs, in view of this positive legislation, of the *tangible personal property* of plaintiff in error for purposes of State and county

taxation? Defendant in error contends that it is in Jefferson County, State of Kentucky, for the four years in controversy. Whether it is actually outside of the boundaries of that State makes no sort of difference. It is owned by the plaintiff in error, a domestic corporation, and its situs for purposes of assessment and such taxation is in that State. The only way to avoid this conclusion is to hold said Section 4020, Kentucky Statutes, to be unconstitutional, inoperative, and void, but this can not be done under the laws of that State, the decision of its Court of Appeals and of other States and the Federal Courts, which have heretofore uniformly held that the situs of all personal property owned by residents of one State may be fixed in such State by the legislative authority of that State, and this has been done by the General Assembly of the Commonwealth of Kentucky in the enactment of said section.

It is not questioned, nor is it important, that another State, where the cars of plaintiff in error or a like company run over railroads, may by statute tax its cars in the proportion that the number operated in such State bears to the whole number operated in the United States or elsewhere, according to mileage or gross earnings, for that question is not decisive of the rights of the State of Kentucky, which has no such statute. Although other States may by statute so tax the cars of appellee such laws of other States do not prevent the State of Kentucky from taxing the entire personal property, that is to say, all the cars of plaintiff in error, or a like domestic corporation, no matter where they were situated at any particular time, or on what lines of railroad they may have been running on the date of each assessment, or whether they had or not acquired an actual permanent or taxable situs in other States, either under the rules of the common law or the statutes of such States. The vital facts giving the State of Kentucky and Jefferson County their rights in this matter of taxation are that the plaintiff in error is a domestic corporation, organized under the laws of that State, having its domicile or residence in that State and County (which is not controverted), and owns the cars that it operates in that State and elsewhere, and that the legislature has fixed the taxable situs in that State and county. How little taxes plaintiff in error pays elsewhere is explained by Mr Vickroy in his deposition. (R., 35.) From his testimony it appears that all the taxes paid by plaintiff in error, whether to the taxing authorities of the State of Kentucky or other States, in the four years for which its personal property should have been assessed for taxation, were as follows: For 1897, $98.60; for 1898, $268.40; for 1899, $1,020.94; and for 1900, $3,196.32. He expressly declined, on the advice of counsel, to state to what States or taxing jurisdictions his company had paid taxes during said years. (R., 44.) He did, however, furnish a statement showing what

State, county and city taxes plaintiff in error had paid in the State of Kentucky for said years. (R., 59.) In this statement the dates of the payments are given in one year for the preceding year, and are as follows:

1898.

March 26, to the City of Louisville.....$239.59
June 31, to the State Auditor..... 58.23

Total.....$297.82

1899.

October 2, to the State Auditor..... $56.89

1900.

September 21, to the State Auditor..... $70.60

1901.

May ——, to the City of Louisville.....$1,507.50

This record, therefore, owing to the unwillingness of counsel for plaintiff in error to allow the facts to be disclosed, does not furnish the court with a list of the States or taxing jurisdictions which have statutes allowing the taxation of any portion of its cars, nor the amount paid to each of them, under such statutes, during the years involved herein. The testimony and the statement furnished by Mr. Vickroy, its comptroller, however, prove that practically all the taxes paid by the plaintiff in error during said four years were paid to the State of Kentucky (on its franchise or intangible property) and to the City of Louisville. It does not appear that said city was paid any sum for the years 1899 and 1900, nor does it appear that plaintiff in error paid the County of Jefferson *any sum whatever* on its franchise or any of its other property for either of the four years in controversy, but, when the total is taken which it claims to have paid for taxes in each of said four years, and the taxes paid in the State of Kentucky are deducted therefrom, it will be seen that very little taxes have been paid by plaintiff in error to other States or taxing authorities, and it has practically escaped taxation on nearly all of its $400,000 worth of tangible personal property, consisting of its refrigerator cars, in each of said four years.

If the statute relied on was dependent for its enforcement on the question of whether or not it affected the plaintiff in error injuriously, no such injury will result to it by the assessment and taxation of all of its property in the State of Kentucky.

The main questions to be determined in this case by the Court of Appeals of Kentucky were:

1. Had the legislature under the State Constitution power to enact the provisions of Section 4020, and jurisdiction over the subject-matter to the extent of requiring residents of that State and domestic corporations to pay taxes in that State on all their personal property, whether situated in or out of that State?

2. Does the provision of said section with reference to personal property out of that State belonging to residents or domestic corporations of that State deprive such persons or corporations of their property without due process of law, or deny to them the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States?

These questions were fully discussed in that court, and in its opinion an affirmative answer was given to the first, and a negative answer to the second question. None of the seven judges of that court, before all of whom this case was heard, dissented from the opinion delivered by Judge Barker.

The first of these two propositions, we insist, was finally and conclusively determined by the highest court in the State of Kentucky, by whose construction of the laws and Constitution of that State, this court is bound. It may be well, however, to discuss the well established doctrine of the courts that the domicile of the owner of tangible personal property may be lawfully fixed as the situs for the taxation of tangible personal property by legislative enactment, although such property may have acquired a permanent or taxable situs in another State, and this power does not depend upon the legislation of the latter State. In other words, that the jurisdiction to tax in such case rests upon the fact that the person of the owner is protected by the laws of the State of his domicile.

II.

THE GENERAL ASSEMBLY OF THE STATE OF KENTUCKY HAD POWER AND JURISDICTION TO PROVIDE THAT THE PERSONAL PROPERTY OF ALL RESIDENTS OF THAT STATE, OR OF CORPORATIONS ORGANIZED UNDER THE LAWS OF THAT STATE, WHETHER IN OR OUT OF THAT STATE, SHOULD BE TAXED IN THAT STATE.

In *Cooley on Taxation* (*3rd Ed., Vol. 1, p. 86*), the author states:

"It is not necessary that both *person* and *property* should be within the jurisdiction in order to be taxable; it is sufficient if *either* is. If a *person* is domiciled within the State, his personalty, in contemplation of law, has its situs there also, and he may be taxed in respect of it at the place of his domicile."

Numerous authorities are cited in support of this text, among others the case of *Commonwealth vs. Hays, 8 B. Mon. 1.* In that case certain statutes passed by the legislature of the State of Kentucky in 1837 and 1845, respectively, were construed. These statutes in effect required the resident to give in for taxation, in addition to the list of specific property, his own estimate, upon oath, of what he was worth in addition thereto, and made it his duty to include in the estimate debts due or coming due to him from persons resident in other States, and *other property not situated within that State.* With respect to this latter class of property the court said (*Ib. 2*):

"Lands and slaves not within this Commonwealth, are absolutely excluded from the estimate, upon the assumption, no doubt, that they are taxed in the country in which they are situated. But other property out of the State is excluded *only* upon the condition that it is subject to taxation by the law of the country where it is. With regard to all other property, except land and slaves, it is the duty of the citizen to include it in his estimate, *unless it is actually subject to taxation by the law of the place where it is*, a fact which, being presumably known to him and not known to the Commonwealth or her officers, is involved in his oath and estimate. He must fix and swear to an estimate of what he is worth, from all other sources, except the ordinary list, his lands or slaves out of the State, his other property out of the State and which is subject to taxation by the laws of the country where it is situated, and except the growing crop on lands listed, and other items mentioned in the proviso of the statute."

In conclusion the court in that case said (*Ib. 3*):

"We are of the opinion, therefore, in every view of the subject, that Hays was bound to include in his residuary estimate not only the value of the debts coming to him from citizens or non-residents of this State, but also the value of debts from non-residents, *and of all other property belonging to him out of the State*, except land and slaves, and except such property out of the State as under his oath he excludes from the estimate, because it is subject to taxation (and should be given in for taxation) by the *laws* of the country where it is situated."

It will be seen in that case the court upheld a similar statute to the one now under consideration.

A like statute, enacted January 9, 1852 (*2 Stant. Rev. Stats., 253-4*), was construed by the same court in the cases of *Barret & Co. vs. City of Henderson; and City of Henderson vs. Barret, 4 Bush, 255.* That statute directed the county assessor, after taking the list of all property required to be specifically listed, "to require each person, on oath, to fix the amount he or she *is worth from all other sources on the day to which said list relates*, after taking out his or her indebtedness from said amount he

or she is worth, exclusive of property in lands, slaves, or other property *not within this Commonwealth, but subject to taxation by the laws of the country where situated;* and the said assessors shall take from the said amount so assessed and listed the sum of one hundred dollars, and set down and list the balance for taxation."

The appellants, Barret & Co., were large purchasers of leaf tobacco from the planters of Henderson and surrounding counties, who stemmed and shipped it to various markets for sale. The City of Henderson insisted upon the right to tax this tobacco wherever situated, but fixed the wrong date for such assessment, the court holding that it was erroneous to assess such property as of any other date than January 10th, and further held that Barret, "like all other owners, should give in *all of the tobacco then owned as part of his estate from all sources not specifically taxed.*" In passing on the validity of said act, the court in conclusion said (*Ib. 260*):

"This act, therefore, we regard as both constitutional and applicable to this case; and, in the absence of any evidence that Barret's money is taxed where situated, it is liable to the assessment for railroad purposes, just as it would be for State revenue. The judgment refusing the assessment as to Barret's funds in other countries was, therefore, erroneous."

With respect to the assessment of personal property, a provision in some respects like that contained in said act of 1852 was incorporated in the Hewitt Act, approved May 17, 1886, as follows (*Section 12, Article 1, General Statutes of Kentucky, Ed. 1887, p. 1038*):

"Personal property (a) of every kind shall be separately stated and valued in the appropriate columns of the tax book herein provided; and if there be no column appropriate, it shall be stated and valued in the column headed miscellany. The assessor, after having taken list of all property required to be listed as above, shall require each person, on oath, to *affix the amount he or she is worth from all other sources on the day to which said list relates*, after taking out his or her indebtedness from said amount. (b) But in estimating his indebtedness, no account shall be taken of debts contracted as surety or guarantor."

Section 3 of the same act, however, provided (*Ib. p. 1035*):

"All property, real and personal, *within this State*, not herein expressly exempt by law, shall be assessed, as nearly as practicable, according to a uniform rate, in the manner hereinafter provided"

The significance of the clause as found in Section 4020, Kentucky Statutes, to wit: "in or out of this State," thus enlarging the former clause, "within this State," as found in the Hewitt Act, must be construed as one intentionally made by the legislature, and the enforcement of which cannot be refused by the courts. Especially is this true when the court will observe

that in Section 4020 there is no exception made of personal property out of this State, which is subject to taxation by the laws of the country where situated, as was provided in the statute of January 9, 1852, *supra.*

In *Cooley on Taxation* (*Third Edition*), *p. 644*, this proposition is laid down:

"Where one is taxed for his personalty at the place of domicile, it is in general immaterial that some *or even the whole of it is at the time out of the State.*"

In support of this text the following cases are cited by the author: *Boyd vs. Selma, 96 Ala., 150; Kirtland vs. Hotchkiss, 100 U. S. 491; Goldgart vs. People, 106 Ill. 25; Foresman vs. Byrns, 68 Ind. 247; Lose vs. State, 72 Ind. 285; Griffith vs. Watson, 19 Kan. 23; Commonwealth vs. Hays, 8 B. Mon. 1; Frothingham vs. Snow, 175 Mass. 59; Horne vs. Green, 52 Miss. 452.*

In *Cooley on Taxation*, it is still further stated (*3rd Ed., Vol. 1, p. 673-74*):

"The proper place for the taxation of a corporation in respect of its personalty is the place of its principal office, *unless some other rule is prescribed by statute.*"

In support of this elementary doctrine numerous cases are cited in the footnotes, to which the court's attention is called.

In *American and English Encyclopedia of Law, Vol. 25, Title "Taxation," p. 152*, under the head of "Corporate Property," it is said:

"The same principles govern the taxation of the property of a corporation as that of private individuals. Its real property is taxable where it lies, its personal property at its corporate residence, or at the place where it is located, *at the option of the legislature.*"

Burroughs on Taxation, p. 186, states:

"A corporation is taxable for its personal property at its domicile, which is the State of its creation, and, within that State, in the town where it has its principal office or place of business."

In *Pullman's Palace Car Co. vs. Pennsylvania, 141 U. S. 18-36*, Mr. Justice Bradley, in an opinion dissenting from the majority of the court as to the conclusions reached in that case, under a *statute* of the State of Pennsylvania, with respect to the taxation of the cars of such companies as the Pullman Palace Car Company, aptly stated the power resting in the legislature of a State to tax the personal property of a resident or domestic corporation of such State, although in another State, as follows:

"But when personal property is permanently located within a State for the purpose of ordinary use or sale, then, indeed, it is subject to the laws of the State and to the burdens of taxation, as well when owned by persons residing out of the State as when owned by persons residing in the State. It has then acquired a situs in the State where it is found.

"A man residing in New York may own a store, a factory or a mine in Alabama, stocked with goods, utensils or materials for sale or use in that State. There is no question that the situs of personal property so situated is in the State where it is found, and that it may be subjected to double taxation—in the State of the owner's residence, *as a part of the general mass of his estate*; and in the State of its situs. Although this is a consequence which often bears hardly on the owner, yet *it is too firmly sanctioned by the law to be disturbed*, and no remedy seems to exist but a sense of equity and justice in the legislatures of the several States."

This view of Mr. Justice Bradley of the powers of a State legislature, in this respect, doubtless accorded with the views of the majority of the court in that case, but he differed with them on the subject of whether the cars of the Pullman Palace Car Company, or any proportion of them, had acquired a sufficiently permanent situs within the State of Pennsylvania as to authorize by statute the taxation of the same in that State.

Even double taxation, in the same State, where the State Constitution does not forbid, may be valid. (*Pacific National Bank vs. Pierce Co. 20 Wash. 675, 56 Pac. 936; State vs. Branin, 23 N. J. L. 484.*)

In New York, where the Constitution does not command equal and uniform taxation, it has been well said: "The rule of most double taxation is a rule of legislation, not of law. It is a question of expediency, not of power. And, while the court will not infer an intention to impose a double taxation, but, rather, will construe a statute otherwise where that can be done without forcing, still the power of the legislature is undoubted." (*People ex rel. N. Y. C. & H. R. R. Co. vs. Roberts, 32 App. Div. 113, 52 N. Y. Supp. 859.*)

In *Tennessee vs. Whitworth, 117 U. S. 136*, this court said, "in corporations four elements of taxable value are sometimes found: 1, franchise; 2, capital stock in the hands of a corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders. Each of these is under some circumstances an appropriate subject of taxation; and it is no doubt within the power of a State when not restrained by constitutional limitations to assess the taxes upon them in a way to subject the corporation or stockholders to double taxation. * * * Sometimes tax laws have that effect; but if they do, it is because the legislature has unmistakably so enacted."

In *People ex rel. Savings Bank vs. Coleman, 135 N. Y. 231*, Chief Justice Earl, in delivering the opinion of the court, said:

"While the legislature may constitutionally impose double taxation, its purpose to do so can never be inferred, but must plainly appear."

Taxation, however, is not double, unless it bears upon the same property, within the same jurisdiction. (*Bradley vs. Bauder, Ohio, 19 Am. L. Reg. N. S. 774.*)

It is not double taxation when the same property is taxed for the same year in two different States or taxing jurisdictions, where each has a right to lay taxes thereon. (*Grigsby Construction Co. vs. Freeman, 108 La. Ann. 435, 58 L. R. A. 349.*)

The legislature, following the adoption of the present Constitution of the State of Kentucky, by the enactment of the Revenue Law of November 11, 1892, which contained Section 4020, endeavored to reach all property that could be lawfully made subject to taxation in that State.

There is no intimation in Section 4020 that the resident owner of personal property out of the State was not to be required to pay taxes thereon if it had acquired a taxable situs elsewhere, or if it was taxable by the statute of another State. Certainly, no such construction is justified on the theory that the personal property sought to be taxed *might lawfully be* taxed in another State, although such other State had enacted no statute on the subject, and the owner in fact paid no taxes thereon in such other State. The Court of Appeals of Kentucky, in its opinion in this case, states the language used is so plain that the slightest examination of this section "leaves nothing for construction."

In the statutes construed in the case of *Commonwealth vs. Hays, supra*, there was an express proviso that a resident of the State should not be required to pay taxes on his personalty in another State, if in that State, by the laws thereof, the same was subject to taxation, and taxes were actually paid thereon by such owner. If Section 4020 had contained such a proviso, this record fails to disclose in the evidence of the plaintiff in error that it paid taxes in any other State by the laws of such State on any part of its personal property during the four years in controversy. Practically all the taxes which this record shows it paid are those paid on its franchise to the Auditor of the State of Kentucky, except taxes on some of its tangible personalty to the City of Louisville in two of the four years in controversy. Plaintiff in error, under no state of case, in law or justice, should have any exemption or relief from the payment of taxes on its personal property in other States, where by the laws of such States it is *not* required to pay taxes thereon, or any part thereof, and has not, in fact, paid any taxes whatever in such States.

Yet under the scheme devised by the judge of the County Court of Jefferson County, without any statute authorizing or directing the same, for taxing the tangible personalty of plaintiff in error, it was taxed upon a very small number of the entire 2,000 cars, owned by it at the dates of assessment involved herein, and, if that judgment had been allowed by the Court of

Appeals of Kentucky to stand, it would have escaped taxation in the several States on almost the entire number of its cars.

It is well settled that in the absence of a statute a State can not tax property such as that of the plaintiff in error, used as it is, passing into or through a State, and acquiring no permanent situs therein. (*State of Indiana vs. Pullman Palace Car Co., 16 Fed. Rep. 193; Pullman's Southern Car Co. vs. Nolan, 22 Fed. Rep. 276; Irwin vs. New Orleans St. L. & C. R. Co., 94 Ill. 105, 34 Am. Rep., 208; Appeal Tax Court of Baltimore City vs. Pullman Palace Car Co., 50 Md. 452.*)

In some States, even where a statnte has been passed on the subject, the same has been declared unconstitutional. (*State ex rel. vs. Stephens, 146 Mo. 662.*)

It is only by virtue of a local statute that the taxation of a proportion of such property on the basis of mileage or gross earnings can be sustained in a State other than that of the domicile of the owner. (*Pullman Palace Car Co. vs. Pennsylvania, 141 U. S. 18-36; American Refrigerator Transit Co. vs. Hall, 174 U. S. 70-82; Union Refrigerator Transit Co. vs. Lynch, 177 U. S. 149.*)

No such statute has been enacted in the State of Kentucky. No method has been devised for the assessment of a portion of the *tangible* property, consisting of cars, used as those of plaintiff in error are, passing over railroad lines into and through that State and acquiring no permanent situs, on the basis of mileage or gross earnings, either by the Railroad Commission, Board of Valuation and Assessment, or the county assessor. The revenue statutes of that State will be searched in vain for any such method of assessment as is provided by statute in Pennsylvania, as appeared in the case of Pullman Palace Car Co. vs. Pennsylvania, *supra*, or in Colorado as appeared in the case of American Refrigerator Transit Co. vs. Hall, *supra*, or in Utah as appeared in the case of Union Refrigerator Transit Co. vs. Lynch, *supra*.

Notwithstanding there is no statute on the subject limiting the rights of the State and the county to, and providing an assessment upon, only a proportion of the refrigerator cars of plaintiff in error, based on mileage or gross earnings, the judge of the County Court devised a scheme of his own, whereby, without any authority of law whatever, the number of the cars of plaintiff in error assessed by him were reached.

Mr. Vickroy, the comptroller, of plaintiff in error, explains in his deposition how he ascertained the average number of cars constructively located in the State of Kentucky for each of the years 1897, 1898, 1899 and 1900. (R., 46.) He does not state the total number of miles the cars of plaintiff in error traversed in all States and countries, or the total number of miles they traversed in Kentucky alone, or the total gross earnings thereon, in either of said four years. Without this information being

furnished it is impossible to test the correctness of his calculations or the results he reached, even if the plan followed by him had any legal basis to rest on. But this method awards to plaintiff in error more than it is entitled to on equitable principles. Why should it be allowed to avoid taxation in its home State on so much of its personal property as is not taxed in other States or countries, or on which no tax is actually paid by it elsewhere? Out of 2,000 cars owned by it the State of Kentucky, by the judgment of the County Court, is only permitted to collect taxes on 28 for 1898, 29 for 1899, 40 for 1900 and 67 for 1901. At $200 per car, an assessment far below cash value, the State and county taxes together amount to a mere pittance against this corporation.

It was within the power of plaintiff in error to have disclosed the exact number of cars, if any, taxed by law out of this State, or on which it had paid taxes, if any, in each of said four years. By its chief officer, under the advice of its counsel, it failed and refused to furnish this information, when asked for by counsel for defendant in error. Would it not be more in accordance with fairness and justice, if the letter of the statute is to be departed from at all, to require the plaintiff in error to show clean hands by making an exhibit of the number of cars on which it paid taxes, if any, in the other States or countries, and the amount of such taxes, so as to give credit thereby on its taxes in the State of Kentucky for each of the years in controversy, and allow that State, under whose laws it exists, to collect taxes on the remainder of its cars at their assessed value? Should it, in other words, be allowed to shelter itself under the plea that it is in the power of other States and countries to tax its cars on the basis of mileage or gross earnings, without showing that power has been exercised by legislation in such States and countries, respectively, and that it has been required to pay taxes thereunder? We believe this court should say no.

The principle on which the right to tax the movable personal or tangible property of the plaintiff in error is based is not that the laws of the State of the domicile of plaintiff in error protect such *property*, but it is based upon the solid ground that the laws of that State protect such domestic corporation, the *person* of the *owner* of such property, and, as a consideration for such protection, that State is entitled to tax all of its personal property, because it is a creature of the laws of that State.

In *Norfolk & Western Railway Company vs. Board of Public Works*, *97 Va. 23*, it was held that the fact that tugs and barges were engaged in interstate commerce did not exempt them from taxation, nor did the place of their enrollment or registration fix their situs for taxation, though it was a circumstance to be considered. It was further held that such personal property owned by a Virginia corporation, and used exclusively in the

transportation of coal from a given point in that State to various other points in other States, and which was not assessed for taxation elsewhere in or out of the State of Virginia, were, under these circumstances, properly taxable in the State of Virginia in the county where they were loaded.

In *Commonwealth vs. American Dredging Company, 122 Pa. St. 386*, it was held that the situs of the personal property of a corporation for purposes of taxation, was at the domicile of its owner. The property taxed in that case consisted of four dredges, which were built outside of the State of Pennsylvania, three of which had never been within the limits of that State; a tug, which had been built outside of that State and was not within its limits during the year for which the taxes were assessed; and eleven scows, which were also built outside of said State, and had never been therein, and during said year all of said property had been employed for corporate purposes in the States of New Jersey, Maryland and Virginia. The court in the course of its opinion in that case said (*Ib. 391*):

"It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another State it would be liable to taxation there. But the facts show that it is not permanently located out of the State. From the nature of the business it is in one place to-day and in another to-morrow, and hence not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here it escapes altogether. The rule as to vessels engaged in foreign or interstate commerce is that their situs for the purpose of taxation is their home port of registry, or the residence of their owner if unregistered. (Citing authorities.) *These vessels, if they may be so called, were not registered. Hence their situs for taxation is the domicile of the owners. This rule must prevail in the absence of anything to show that they were so permanently located in another State as to be liable for taxation under the laws of that State.*"

So, in the case at bar, the cars of plaintiff in error are no more permanently located out of the State of Kentucky than the dredges, tug and scows of the American Dredging Company were out of the State of Pennsylvania. These cars have no abiding place, being "in one place to-day and in another to-morrow."

In re Swift's Estate, 137 N. Y. 77, it was held that where the estate of a decedent, who was a resident of the State of New York, included real estate and *chattels in another State*, and, under a power of sale given by his will to the executors for the purpose of paying legacies and making distribution of said property, was sold and converted into money, that the real property without the State was not subject to appraisal and tax under the succession tax law of New York, but that the personalty

was. The opinion rendered in that case is by Judge Gray, who dissented from the rest of the court. At the conclusion of his opinion he states (*Ib. 88*):

"As to the personal property of a resident decedent, wheresoever situated, whether within or without the State, they (meaning a majority of his brethren of the court) are of the opinion that it is subject to the tax imposed by the act."

In *Leonard vs. City of New Bedford, 16 Gray, 292*, it was said:

"The general rule as to personal property is that it follows the person of the owner, and, in most cases, in reference to taxes would be taxed at the place of the inhabiting of the owner. But as to goods, wares and merchandise, or any stock in trade, or any stock employed in manufacturing or the mechanical arts, and where the business of selling or manufacturing is carried on in this Commonwealth, it has not been thought a violation of any principle of comity to a sister State to tax such goods or stock in the town where they were thus made the subject of sale or manufacture. The extent of this taxation, and the circumstances under which it may take place, must be a subject of *statute regulation*. This our legislation has done."

In that case such personal property of a Rhode Island corporation was taxed by the City of New Bedford, in Massachusetts, under a statute of the latter State.

In *Appeal Tax Court of Baltimore vs. Western Maryland R. R. Co., 50 Md. 274*, it was held, in the absence of some positive statutory rule of distribution and apportionment prescribed by the legislature, that the place of the domicile of the company was the situs of all of its personal property for purposes of taxation. (Citing *Burroughs on Taxation, 186*, and cases there cited.)

In the case of *Appeal Tax Court of Baltimore City vs. Northern Central Railroad Co., 50 Md. 417*, it was held that the home office of the company being in the City of Baltimore, its rolling stock must be taxed in that city, there being no statutory provision in that State creating a different situs for different portions of the rolling stock in use on different parts of the line of the company.

The like doctrine must be applied in the case at bar. The truth is, the cars of the plaintiff in error have not acquired a *permanent* situs or location in any of the other States any more than they have in the State of Kentucky. They are constantly going and coming, passing to and fro, and Mr. Vickroy testified he could not tell at any particular time where such cars were located, in what States, in what numbers, or on what lines of railroad. (R., 46-50.) Indeed, they may be "in one State to-day, in another to-morrow," and still another on the third day, or out of the United States entirely, in the Dominion of Canada, or the Republic of Mexico. This whole record shows a plain and unmistakable

effort on the part of the plaintiff in error to escape taxation on its tangible personal property, on the theory that the same has acquired a taxable situs elsewhere and *may be* taxed in other States, when no such state of facts exists to any considerable extent; and even if such were the fact, it is questionable whether or not the rights of the State of Kentucky, in this respect, can be measured by the laws of other States. If the plaintiff in error escapes taxation in the State of Kentucky upon all of its personal property, it is perfectly manifest that it will pay no tax to any State or taxing authority on nearly all of its tangible personal property, consisting of its refrigerator cars, which constitute its sole assets, and have been capitalized at $2,000,000. (Vickroy's deposition, R., 41.) Being asked what taxes the plaintiff in error paid to the State of Missouri or the City of St. Louis, where it has an office, Mr. Vickroy, under the advice of counsel, declined to answer the question. (R., 45.) The only State, so far as this record shows, in which plaintiff in error has paid any taxes outside of the State of Kentucky, or in which there exists a statute under which it is bound to pay taxes on a proportionate part of its cars, is the State of Utah, and the small amount of taxes ($5.76) paid to that State was paid at the end of a law suit finally decided by this court. Plaintiff in error, it appears, had litigation over its taxes in the State of Missouri, but Mr. Vickroy testifies the law of that State was declared unconstitutional. (R., 51.) He doubtless referred to the case of *State ex rel. vs. Stephens, 146 Mo. 662*, wherein it appeared that the Armour Packing Company, a corporation of the State of New Jersey, had complied with the statute of the State of Missouri so as to do business in that State, and was engaged in Kansas City, in the State of Kansas, in the general packing business, that is to say, in killing and dressing food animals, and the sale of meats thereof, in which it was necessary to ship in cars the dressed meats from the packing houses in Kansas into and through all the States of the Union, and through all the counties in the State of Missouri traversed by railroads, and owned a large number of refrigerator cars specially constructed so as to preserve at a cool temperature dressed meats therein packed for shipment over the various railroads of the country, which cars, when loaded and ready for shipment, were placed in the trains operated by railroad companies and hauled to their respective destinations; and the court held that the said company, the relator, though a foreign corporation as to the State of Kansas, had acquired a domicile in that State and the cars could only be taxed in that State. This rule was established, and the reason of so holding, as stated in the opinion, was (*Ib. 682*) "that the cars could not be reached for assessment and taxation anywhere else, and the company owed this return to the State of Kansas for the protection it received from it. * * * The cars are

in the State of Missouri only *in transitu* and have no situs in this State. Hence they are not subject to assessment or taxation in this State." (Citing authorities.)

In the case of plaintiff in error, *Union Refrigerator Transit Company vs. Lynch, Treasurer, 18 Utah, 378, 48 L. R. A. 790,* the court will find that plaintiff in error undertook to defeat the effort of the taxing authorities of the State of Utah to tax the proportional part of its property, consisting of cars operated or used on the various railroad lines in that State, on the ground, among others, that it was a corporation organized under the laws of the State of Kentucky, having its principal office and place of business in the City of Louisville. It may be remarked here that but few of the States, in comparison to the whole number, have laws to tax the personal property of foreign corporations in the proportion that the same has acquired a fictitious situs in such States, as provided by the statute of Utah, but that fact does not prevent the State of Kentucky from taxing the plaintiff in error, where it is a domestic corporation, upon all of its personal property, on the ground that the same has there a fixed legal situs, not only under the well established rule of the common law, but the *express statute* found in Section 4020. While this may, in rare instances, result in what is termed erroneously "double taxation," there is no constitutional limitation, as we have seen, on the power of the legislature of the State of Kentucky to tax its own domestic corporations on their entire personal property, although the same, or a portion thereof, may have acquired under the operation of a local statute a situs elsewhere.

Plaintiff in error took a writ of error to the Supreme Court of Utah in the case referred to, and in *Union Refrigerator Transit Company vs. Lynch, supra,* it appears, in its bill in that case it alleged:

"That it is and was during all the times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky; that its principal office and place of business is in the City of Louisville, in said State, and was and is engaged exclusively in the business of furnishing to shippers refrigerator cars for the transportation of perishable freight over the various lines of railroad throughout the United States, and of soliciting shipments for such cars, and giving to the said cars needful attention at various points of transit; that the said cars are and were during the said times the sole property of the plaintiff, and are not and were not during any of the said times allotted, leased, rented, or furnished under contract to any railroad company or companies or carriers of freight; nor were they run on any particular line or lines of railroad; nor were they confined to any particular route or routes, nor in any particular trains, nor at any specified or agreed times, but are

and were run indiscriminately over the lines of railroad over which consignors of freight shipped in such cars choose to route them in shipping."

Furthermore, it is alleged:

"*That said cars do not and did not abide, nor have they at any time had any situs within the said State of Utah*, nor has this plaintiff, nor has it heretofore at any time had, other property of any description whatsoever located within the State of Utah."

Plaintiff in error thus defined its own situs and that of its personal property. According to its own admission in its bill, in that case, the situs of all its property was and is in the City of Louisville, State of Kentucky, and it has no permanent situs elsewhere. But for the positive statute of Utah, plainti error would have escaped all taxation in that State.

It is a well known fact, of which this court will take judicial notice, that the ordinary freight cars of foreign railroad corporations, not owning nor operating any line in the State of Kentucky, are constantly moving over the lines in that State owned or operated by other railroad companies or private lines, yet that State has no statute providing for the assessment or taxation of such cars or a proportional part thereof. It is a matter of common knowledge that the freight cars of the Lake Shore, New York Central, Missouri Pacific, and other railroad companies that neither own nor operate any line in the State of Kentucky, form a part of freight trains constantly running over the lines of the Louisville & Nashville, Southern, and Illinois Central, which do own or operate lines in that State; but these cars of foreign companies are not taxed in that State, for there is no statute providing therefor, and they form no part of the "rolling stock" of the companies who "own or operate lines" in that State, as provided by its revenue law. (*Sec. 4096, Kentucky Statutes, Carroll's Edition, 1903.*) Even the Pullman Palace Car Company pays no tax to the State of Kentucky on its cars passing through that State, as there is no statute in that State requiring the collection of taxes on such property.

Plaintiff in error has escaped practically all taxation, for it neither owns nor operates a line of railroad in or out of the State of Kentucky. Aside from the legal right of that State to tax this domestic corporation on all its personalty, under Section 4020, it is not unjust to do so, for it has little or no taxes to pay elsewhere, and there is, therefore, neither actually nor theoretically any "double taxation," worthy of consideration by this court. Besides, "double taxation," to be illegal, must be imposed by or under the laws of the same State or taxing authority, on the same property, and against the same owner.

In the oral argument of this case in the court below reference was made by counsel for plaintiff in error to Sections 4079 and 4080 providing for the assessment of the franchise or intangible

property of corporations, and a conflict was attempted to be shown between those sections and Section 4020, with respect to the assessment of personal property. The latter section pertains to all personal property, tangible and intangible, while the former sections pertain exclusively to the assessment of intangible property. These are legitimate subjects of legislation, and the situs of tangible and intangible property, respectively, may be fixed by an act of the legislature, and there is nothing in the State Constitution that prohibits the exercise of such legislative power.

Nor is Section 171 of the State Constitution violated by Section 4020, Kentucky Statutes, which operates uniformly upon all residents and domestic corporations, owning property subject to taxation, within the territorial limits of the authority levying the tax.

In contemplation of law, and by the express letter of this section of the statute, all of the personal property of the plaintiff in error, being a domestic corporation, is located and has its situs for taxable purposes within the State of Kentucky. It is, therefore, within the territorial limits of both the State and county, the authorities levying the tax sought to be collected by this proceeding.

The judge of the County Court disapproved the proposition advanced by counsel for plaintiff in error, and argued at length in their printed brief in the court below, that Section 171 of the Constitution limits the property subject to taxation to that which is *actually* located within the territorial limits of the authority levying the tax. (R., 22-23.) That such is not the true meaning of that section, the court below has repeatedly decided. (*Langdon-Creasy Co. vs. Owenton Common School District, 116 Ky. 562.*)

In *Wren vs. Boske, Sheriff, 24 R., Vol. 2, p. 1780*, it appeared that appellant resided in Scott County, Kentucky, and owned tangible personal property, consisting of live stock, on a farm in Kenton County, in that State, where it had been eight years. This property was assessed for taxation in both counties, and although it was conceded the same had acquired a situs in Kenton County, the court held it was taxable only in Scott County, where the owner resided, using this language (*Ib. 1781*):

"We are referred to a number of decisions holding that personal property of non-residents of the State, which had obtained a situs in the State, may, *if the legislature so provides*, be taxed in that State, and the same rule would no doubt apply between the different counties of the same State, *if the legislature so provided*. But the question, after all, is one of legislative intent."

It will be observed by the court, from the adjudged cases, the power and jurisdiction of the State of the owner's domicile to tax tangible personal property, wheresoever actually situated,

seems not to have been heretofore doubted by the courts. The questions litigated appear to have related altogether to the power and jurisdiction of the State where such property was situated, by statute to tax the same, although the owner was a non-resident of that State.

Further discussion or citation of authorities on this branch of the case is deemed unnecessary, as it has been uniformly held by all the text-writers on "Taxation" and by all the courts, both State and Federal, that the jurisdiction in the State legislature over the personal property of a resident or domestic corporation of such State, in all matters of taxation, such as fixing the situs, place and method of such taxation, is full and complete.

III.

THE PLAINTIFF IN ERROR IS NOT DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, NOR DENIED THE EQUAL PROTECTION OF THE LAWS BY SECTION 4020, KENTUCKY STATUTES, WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Under the decisions of this court it is entirely lawful for the legislature of the State of Kentucky to provide, as it has done under Section 4241, Kentucky Statutes, for the retrospective assessment and taxation of personal property, or any species of property, without also at the same time providing for such assessment and taxation of other species of property for the same purpose, and such legislation is not in conflict with the Constitution of the United States.

In *Florida Central & Peninsular Railroad Company vs. Reynolds, 183 U. S. 474*, the court held "there is nothing in the Federal Constitution which forbids a State to reach backward and collect taxes from certain kinds of property which were not at the time collected through lack of statutory provisions therefor, or in consequence of a misunderstanding as to the law, or from neglect of administrative officials, without also making provision for collecting the taxes for the same years on other property."

Mr. Justice Brewer, in the course of his opinion in that case, on the retrospective feature of the Florida statute, stated (*Ib. 480-481*):

"If taxes are to be regarded as mere debts, then the effort of the State to collect from one debtor is not prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of the government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into a like contribution. In Winona & St. Paul

Land Co. vs. Minnesota, 159 U. S. 526, legislation of Minnesota for the collection of delinquent taxes on real estate was challenged because of a lack of similar legislation in respect to personal property, but the challenge was overruled, the court saying:

"'This statute rests on the assumption that, generally speaking, all property subject to taxation has been reached, and aims only to provide for those accidents which may happen under any system of taxation, in consequence of which here and there some item of property has escaped its proper burden; and it may well be that the legislature, in view of the probabilities of changes in the title or situs of personal property, might deem it unwise to attempt to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. At any rate, if it did so, it would violate no provision of the Federal Constitution, and whether it did so or not was a matter to be determined finally by the Supreme Court of the State.'

"Our conclusion is that, so far as the Federal Constitution is concerned, the legislature of Florida had the power to compel the collection of delinquent taxes from the railroad companies for the years 1879, 1880 and 1881, even though it made no provision for the collection of delinquent taxes for those years on other property. The judgment, therefore, of the Supreme Court of Florida is affirmed."

Section 4241, Kentucky Statutes, however, provides for the retrospective assessment of all taxable property, without discrimination, where it has been omitted from regular assessment.

In *King vs. Mullins, 171 U. S. 436*, the court said:

"The judiciary should be very reluctant to interfere with the taxing systems of a State, and should never do so unless that which the State attempts to do is palpable violation of the constitutional rights of the owners of property. Under this view of our duty we are unwilling to hold that the provision referred to is repugnant to the clause of the Fourteenth Amendment forbidding the denial of the equal protection of the laws."

In *Judson on Taxation, Sec. 437, p. 562*, the author states:

"It is not, however, necessary to uniformity and equality in this fundamental sense that all the subjects of taxation in the State should be taxed in the same manner or by the same system of assessment. This would obviously be impossible, as the taxing power extends not only to property, but to occupations and persons within the State's jurisdiction, and the same rule of assessment could not be applied to these different classes of subjects. Even as to property taxation alone, the complicated conditions of modern industrial civilization, *and the mobility of many forms of personal property which effectually elude the tax-gatherer*, require special adjustment of taxing systems to insure even an approximation to equality in the distribution of public burdens."

In the *Head Money Cases, 112 U. S. 595*, Mr. Justice Miller said:

"Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream."

In *Bell's Gap R. Co. vs. Pennsylvania, 134 U. S. 233*, the court said:

"We think we are safe in saying the Fourteenth Amendment was not intended to compel the States to adopt an *iron rule* of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require."

In *Merchants & Manufacturers Bank vs. Pennsylvania, 167 U. S. 464*, the court quoted with approval the language of the Supreme Court of Pennsylvania in the case under review on writ of error, as follows:

"The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them, then, that can stand."

Again, in *Columbus Southern R. Co. vs. Wright, 151 U. S. 478* (affirming 89 Ga. 574), in holding there was no violation of the Federal Constitution by a statute of the State of Georgia providing a system of taxing the rolling stock and other unlocated personal property of railroad companies, the court said:

"This is hardly an open question. Various modes of taxing railroad property are adopted by the different States. In some, railroad companies are taxed upon their property as a unit. In others, the road and the property in each county are separately assessed, and in still others, the whole road is assessed, and then the assessment apportioned among the several counties and towns. These and all similar modes of taxation are subject to the legislative discretion of the respective States, and do not ordinarily present any Federal question whatever. But the mode of distribution of the *unlocated or transitory personal property* is a matter of regulation *by the State legislature*, which in no way involves a violation of the Fourteenth Amendment."

So, in *Kentucky Railroad Cases, 115 U. S. 321*, in holding there was no denial of the equal protection of the laws by the statute providing for the assessment of the tangible property of railroad companies, in that State by the Railroad Commission, the court said:

"But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon *all* descriptions of property. The whole matter is left to the discretion

of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between *railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained.* The different nature and uses of their property justify the discrimination in this respect, which the discretion of the legislature has seen fit to impose."

The statute involved in that case is still in full force and forms a part of the present Constitution of the State of Kentucky until otherwise provided by the legislature. (*Sec. 182.*)

In South Carolina, the Constitution and statutes of the State provided, as in Kentucky, that taxation of property should be equal and uniform and in proportion to its value, but it was held in *Charlotte, C. & A. R. Co. vs. Gibbes, 142 U. S. 386,* that a statute which provided that "the entire expenses of the Railroad Commission, including all salaries and expenses of every kind, shall be borne by the several corporations owning or operating railroads within this State according to the gross income proportioned to the number of miles in the State, to be proportioned by the Comptroller General of the State," was not in violation of the Fourteenth Amendment guaranteeing the equal protection of the laws. The complaining railroad company, in addition to its other taxes, was assessed with $987.75, as its proportionate share of said expenses, but, in passing upon the Federal question, the court, in an opinion by Mr. Justice Field, said:

"All railroad corporations in the State are treated alike in this respect. The necessity of supervision extends to them all, and for that supervision the like proportional charge is made against all. There is no occasion for similar regulations for the government of other than railroad corporations, and therefore no charge is made against them for the expenses and salaries of the commissioners. The rule of equality is not invaded where all corporations of the same kind are subjected to like charges for similar services, though no charge at all is made against other corporations. There is no charge where there is no service rendered. The legislative and constitutional provision of the State that taxation of property shall be equal and uniform, and in proportion to its value, is not violated by exacting a contribution according to their gross income in proportion to the number of miles of railroad operated in the State to meet the special service rendered." (Citing authorities.)

In *Louisville & Nashville Railroad Company vs. City of Louisville, 16 R. 796*, the Court of Appeals of Kentucky held that the legislature had the right to provide for the assessment and collection of municipal taxes from railroad corporations by a different system or mode from that by which such taxes are assessed and collected on other property, the rate of taxation imposed being the same, and that the provision in the charter of the City of Louisville allowing a discount of three per cent. on tax bills paid within a certain period does not apply to taxes due from railroad corporations, a different method of securing prompt payment of taxes being provided as to them, and it is further held that it is not an illegal or unconstitutional discrimination to deny such discount for prompt payment of municipal taxes to railroad corporations.

In *Kidd vs. Alabama, 188 U. S. 730-33*, this court held that the equal protection of the laws was not denied by the statutes of Alabama, which provided for the taxation of shares of stock owned by a resident of that State in foreign railroad corporations, but exempted from taxation the shares of stock in railroad and other domestic corporations. In the course of the opinion by Mr. Justice Holmes, it was said:

"The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the State of Alabama is not concerned. No doubt it would be a great advantage to the country and to the individual States if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far. (Citing authorities.) One aspect of the problem was touched in the case of *Blackstone vs. Miller*, at the present term, *187 U. S. ante, p. 277*. The State of Alabama is not bound to make its laws harmonize in principle with those of other States. *If property is untaxed by its laws, then, for the purpose of its laws, the property is not taxed at all.*"

To the same effect is the decision in *Wright vs. Louisville & Nashville R. R. Co., 195 U. S. 219*.

In the light of these authorities it is clear that there is no denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution by the enactments of Sections 4020 and 4096, Kentucky Statutes. In the former all the personal property of individuals and domestic corporations is put upon exactly the same footing in the matter of assessment and taxation for State, county and local purposes, while in the latter section the rolling stock of railroad companies owning or operating lines in the State, or in the State and elsewhere, is classed by itself, and such proportion thereof as the mileage owned or operated in the State bears to the entire mile-

age owned or operated by such a railroad company, is subject to assessment and taxation in the State, and distributed according to mileage owned or operated among the several counties, cities and taxing districts.

No discrimination whatever is made by the provision in Section 4020 between resident individual or corporate owners of personal property. The legislature was not bound to place the personal property or rolling stock of a domestic railroad corporation or company on the same footing, or fix for such property the same situs as that of individual residents or other corporations organized under the laws of that State. The law pertaining to railroads and railroad property existing on September 28, 1891, by an express provision in Section 182, was to remain in force "until otherwise provided," and the legislature has not seen proper since to otherwise provide. It was not bound to otherwise provide, when framing its revenue laws pertaining to the personal property of all other resident owners. It has by Sections 4096-4102, Kentucky Statutes, simply continued in force or re-enacted that part of the Constitution with reference to the assessment, situs, and taxation of the rolling stock or personalty of railroad corporations or companies, whether foreign or domestic corporations, which own or operate lines in that State, or that State and elsewhere. The Constitution left the legislature free to provide, in its discretion, the method of assessment and to fix the situs of all other personal property owned by resident individuals or domestic corporations. This method, of course, under Section 171 of the Constitution must be uniform on all that kind of property, in or out of the State of Kentucky, among all such owners as have their domicile in that State, leaving out of consideration railroad personal property owned by railroad corporations or companies that own or operate lines in that State, or in that State and elsewhere, which, under Section 182, is expressly excepted from the uniform system with respect to the assessment, situs, and taxation of other property.

Under Section 182 of the Constitution the legislature, in the enactment of Section 4020, had the right to distinguish the personal property of a domestic corporation other than a railroad company (although capable of being used upon railroads in that and other States) from the rolling stock or personal property of railroad companies, domestic or foreign, actually owning or operating lines of railroad in that State, or in that State and elsewhere. In other words, the legislature can lawfully provide, under Section 182, a different method for the assessment and taxation of personal property, consisting of the rolling stock of a railroad corporation or company, which owns or operates lines of railroad in that State or in that State and elsewhere, from that provided for the assessment of personal property of all other

domestic corporations, including such a corporation as the plaintiff in error, which merely owns a class of personal property that is capable of being used upon railroads in that State and elsewhere, but which does not in fact own or operate a mile of any railroad in that State or elsewhere.

Section 182 is as follows:

"Nothing in this Constitution shall be construed to prevent the General Assembly from providing by law how railroads and railroad property shall be assessed and how taxes thereon shall be collected. And, until otherwise provided, the present law on said subject shall remain in force."

Under that section the legislature has power to fix the situs of so much of the rolling stock of a railroad company as it may deem proper within the limits of the State for purposes of taxation, and to require the owner of that proportion to be assessed and pay taxes thereon. In other words, the statute of the State pertaining to railroads and railroad property in force at the time of the adoption of the present Constitution is made a part of Section 182 of the Constitution, "until otherwise provided." The legislature, although it has passed a law on the subject, has not as yet "otherwise provided," but has simply re-enacted the statute which was in force at the time the Constitution was adopted. *That law prescribes what railroad property is meant by Section 182.* This court need only to examine the statute to see that "railroad property" pertains exclusively to such property of a railroad company or corporation that *owns or operates a line of railroad in the State.* In the oral argument on the trial of this case in the court below counsel for plaintiff in error expressly admitted that they did not claim that the refrigerator cars belonging to plaintiff in error were "railroad property," within the meaning of Section 182 of the State Constitution. Having made an exception of railroads and railroad property, the framers of the Constitution intended that that class of property should stand by itself, separate and apart from all other kinds of property, and all other provisions of the Constitution must be construed in view of that exception. The statute in force at the adoption of the Constitution, since re-enacted, and still in force, forms a part of the fundamental law of the State, and that statute authorizes and directs how the rolling stock of a railroad company which owns or operates a railroad in that State, or in that State and elsewhere, shall be apportioned, assessed, and taxes thereon collected. That statute, furthermore, in one sense, fixes the situs of the rolling stock of a railroad company or corporation that owns or operates a railroad in that State. So long as this statute remains in force or a part of the Constitution it cannot be complained of by any other kind of domestic corporation or the resident owner of *similar* or other personal property, who may be taxed upon *all* of his personal

property, if the legislature chooses, as it has done, to fix the situs thereof in that State. Such legislation brings about no unconstitutional discrimination, but, by the express letter of Section 182, such apparent discrimination is permitted exactly as it was by the same statute when this court decided the *Kentucky Railroad Tax Cases, 115 U. S. 321.*

Under this view, Section 171 of the Constitution, providing that taxes "shall be uniform upon all property *subject to taxation* within the territorial limits of the authority levying the tax" must be construed as the general provision, while Section 182 must be construed as an exception thereto, as well as to all other parts or sections of that instrument, so far as the situs of the property to be taxed is concerned. The clause "subject to taxation," in Section 171, referring to all property within the territorial limits of the authority levying the tax, does not mean simply all property not exempt from taxation, but it has a more comprehensive meaning and embraces, as well, property whose situs is legally fixed within the territorial limits of the authority levying the tax whether actually situated therein on assessment day or not. In other words, while Section 182 continues in force, the statute concerning railroads and railroad property so as to make it lawful to assess and tax only a proportional part of the rolling stock or personal property of railroad corporations owning or operating a railroad in that State, or that State and elsewhere, and empowers the legislature to otherwise provide or not, in its discretion, with respect to that class of property, Section 171 makes it imperative on the legislature to provide a uniform method of assessing and collecting taxes upon all other property subject to taxation within the limits of the authority levying the tax, and in doing so, to fix the situs of the personal property owned by resident individuals and domestic corporations, other than railroad companies or corporations owning or operating lines of railroad in that State, or in that State and elsewhere.

Accordingly in the opinion of the Court of Appeals of Kentucky in the case at bar, on this point, it is stated:

"It is said that the fact that all of appellee's cars are taxed, whether in this State or not, while in assessing the property of railroads, the cars in use out of the State are omitted, is an unjust discrimination against it, and is violative of the Fourteenth Amendment as to the 'equal protection' of the laws. Railroad corporations occupy an unique position in our fiscal system. They are, by the express language of the Constitution, taken out of the category of other property as to the manner in which they are taxed; but, in so doing, it is not intended to violate the fundamental principle of the Constitution as to uniformity in taxation, but on the contrary, to enforce and secure it; and it is confidently believed that the system devised does accomplish the end desired

as nearly as may be. We will not burden this opinion with any attempt to show the reasons for the distinction in the fiscal law as to railroads, nor the fact that they are not unduly favored in their isolation; these are obvious, and this court has uniformly upheld the validity of the statute which provides and enforces the anomalous mode of taxation applicable to them. Kidd vs. Adams, *supra*, and the Kentucky Railroad Tax Cases, 115 U. S. Rep. 321, are conclusive of the Federal question."

In *Kirtland vs. Hotchkiss, 100 U. S. 491*, a citizen of Connecticut was assessed on certain bonds executed in Chicago, payable to him in that city, secured by deed of trust by the obligor upon real estate there situated. The law of Connecticut declared that personal estate in that State "or elsewhere should be deemed, for purposes of taxation, to include all moneys, credits, choses in action, bonds, notes, stocks (except United States stocks), *chattels or effects* or any interest thereon; and that such personal property or interest thereon, being the property of any person resident in the State, should be valued and assessed at its just and true value in the tax list of the town where the owner resides." The statute expressly exempted from its operation money or property actually invested in the business of merchandising or manufacturing when located out of the State. The court below held the assessments complained of were in conformity to the law and that the law itself did not infringe any constitutional right of the plaintiff. Writ of error was prosecuted by the tax payer to this court on the ground that the statute of Connecticut thus interpreted was repugnant to the Constitution of the United States, and, among other contentions made by him, were these:

The statute taxed the property situated without the State of Connecticut.

It deprived the plaintiff in error of his property without due process of law, and thus violated the Fourteenth Amendment.

This court, by Mr. Justice Harlan, said (*Ib. 498*):

"It may, therefore, be regarded as the established doctrine of this court that so long as the State by its laws, prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States, this court, as between the State and its citizen, can afford him no relief against State taxation, however unjust, oppressive or onerous."

Further on the court says:

"The creditor, it is considered, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow citizens of the same State, to contribute for the support of the government whose protection he enjoys."

In conclusion the court said:

"Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes in return for the protection it affords them, by the value of the credits, choses in action, bonds or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal government cannot rightly interfere."

In *State Railroad Tax Cases, 92 U. S. 607-8*, Mr. Justice Miller, speaking of the situs of personal property following the domicile, said:

"But, after all, the rule is merely *the law of the State which recognizes it;* and when it is called into operation as the property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. Like all other laws of a State, it is, therefore, subject to legislative repeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation."

It will be observed by this passage of the opinion in that case that the power of each State, that of the domicile as well as that of the location of the property, to tax the *same* property is recognized, unless a rule of comity by the latter is observed.

In the case of *Marye vs. Baltimore & Ohio Railroad, 127 U. S. 117*, the power of Virginia to levy a tax upon the personal property of the railroad company permanently used in that State was recognized: but in that case no statute had been passed exercising this power, and the court held that *all* of the personal property of said railroad company was taxable in the State of Maryland, under whose laws it had its domicile. But in harmony with the right of the State of Maryland it was held that Virginia could also tax so much of the property as had been brought into that State and was there used permanently by the railroad company.

In *Pullman Palace Car Co. vs. Pennsylvania, 141 U. S. 29*, Mr. Justice Gray, in concluding the opinion of the court upholding a statute which taxed a proportional part of the cars of said company operated through the State of Pennsylvania, said:

"For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its situs at the owner's domicile, and in adopting the system of taxing it at the place at which it is used and by whose

laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether."

Applying the doctrine there laid down to the case at bar, it is manifest that so far as other States have not abandoned the legal fiction that personal property has its situs at the owner's domicile, and have adopted no system of taxing a proportional part of the cars of plaintiff in error used in such States, the plaintiff in error would escape taxation altogether if the State of its domicile is denied the right to tax its tangible personal property, as contended for by defendant in error.

The defendant in error in this case does not rely on a mere legal fiction or the maxim *mobilia sequuntur personam*, but upon a *positive statute* fixing the taxable situs of tangible personal property in Kentucky, where the owner is domiciled in that State. In such a state of case we have not found a solitary decision of any court, State or Federal, holding such a statute is in conflict with the Fourteenth Amendment or amounts to a taking of the owner's property without due process of law.

There is no provision in the Federal Constitution governing State taxation which forbids unequal or double taxation. (*Davidson vs. New Orleans, 96 U. S. 77, 106; Dyer vs. Osborne, 11 R. I. 321; People vs. The Home Insurance Co., 92 N. Y. 347, affirmed in 119 U. S. 129.*)

In *Savings and Loan Society vs. Multnomah County, 169 U. S. 421*, a statute of Oregon taxing the mortgagee, though a resident of California, upon a mortgage on real estate and the debt secured thereby, was upheld as a tax on real estate. In other words, the mortgage was held to represent an interest in the real estate mortgaged. In the course of the opinion of Mr. Justice Gray in that case, he said (*Ib. 427*):

"*Personal property, as this court has declared again and again, may be taxed, either at the domicile of its owner, or at the place where the property is situated*, even if the owner is neither a citizen nor a resident of the State which imposes the tax. (Citing authorities.)"

This court is not concerned with the policy or wisdom of the legislation as embodied in Section 4020, Kentucky Statutes, so long as it violates no provision of the Constitution of the United States. As was said in *Louisville & Nashville R. R. Co. vs. Kentucky, 183 U. S. 512:*

"It is scarcely necessary to say that courts do not sit in judgment on the wisdom of legislative or constitutional enactments. This is a general principle; but it is especially true of Federal courts when they are asked to interfere in a controversy between a State and its citizens."

The power and jurisdiction to tax tangible personal estate, of both the State of the domicile of the owner and the State of the actual situs of tangible personal property, is recognized by

this court in *Blackstone vs. Miller, 188 U. S. 189*, cited by the court below in its opinion in the case at bar. It is true the tax involved in that case was upon the right of succession to personal property, consisting of a deposit in bank, but that fact is deemed immaterial, as such a tax is indirectly a tax on the property itself, and the power of each State to tax at all or in any manner is dependent upon the same principle of law.

In the course of the opinion of the court, delivered by Mr. Justice Holmes, in that case, he said (*Ib. 204*):

"No one doubts that succession to a *tangible chattel* may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is part of a *universitas* and is taken into account again in the succession tax there. (Citing authorities.)

"No doubt this power on the part of two States to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted also that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law. (Coe vs. Errol, 116 U. S. 517, 524; Knowlton vs. Moore, 178 U. S. 41.)"

Counsel for plaintiff in error rely on the case of *Louisville & Jeffersonville Ferry Co. vs. Commonwealth of Kentucky, 188 U. S. 385*, but that case is easily distinguished from this. There the State of Kentucky undertook to tax the Ferry Company on the value of the franchise granted to it by the State of Indiana. That franchise was held by this court to be an incorporeal hereditament derived from, and having its legal situs for the purpose of taxation in Indiana. In other words, said franchise was an interest in real estate located in the State of Indiana, and, therefore, not taxable in the State of Kentucky. It was not personal estate at all. It was such an estate as would, if owned by an individual, have passed to his heir at law, and not to his personal representative, at the death of the owner. In other words, it was the same character of an estate as an easement or right of way in or over the real estate, and necessarily partook of the nature of such estate and was in no sense personal property. Mr. Justice Harlan in the course of his opinion states (*Ib. 398*):

"No difficulty can exist in applying the general rule in this case, for, beyond all question, the ferry franchise derived from Indiana is an *incorporeal hereditament* derived from and having its legal situs in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process

of law, in violation of the Fourteenth Amendment of the Constitution of the United States; as much so as if the State taxed the *real estate* owned by that company in Indiana."

A still later case, *Delaware, Lackawanna & Western R. R. Co. vs. Pennsylvania, 25 Sup. Ct. Rep. 669*, decided May 15, 1905, is relied on by counsel for plaintiff in error to sustain their contentions herein. Upon a casual reading of the opinion in that case one might conclude it had there been held by this court that it was beyond the power and jurisdiction of a State to impose a tax on tangible personal property, owned by a resident individual or corporation, where such property was permanently situated in another State. The facts there showed the railroad company, a corporation of Pennsylvania, owned coal to the value of over $1,700,000, which had been transported from that State to and was situated in other States awaiting sale. The value of this coal was included by the appraisers in the value of said company's capital stock, taxable under a statute of Pennsylvania enacted in 1891. In the course of the opinion the court observes:

"Counsel for the defendant in error * * * concede that the courts of Pennsylvania have held that tangible property, permanently located outside of the State, for the use and benefit of the corporation, and owned by it, is exempt from taxation *under this statute*. They also concede that it was never within the intent or power of the legislature to impose a tax upon tangible property when held outside of the territorial limits of the State."

Mr. Justice Peckham then proceeds to state:

"If the State cannot (meaning under that statute) tax tangible property permanently outside the State and having no situs within the State, it cannot attain the same end by taxing the enhanced value of the capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the State."

In presenting the exact question for decision in that case he further said:

"The question now discussed is simply whether, *under this statute*, property of the corporation is, in substance and effect, taxed while it is beyond the jurisdiction (meaning the limits) of the State, never to return."

The express language of the Fourth Section of the Pennsylvania statute of 1891 confined its operation to corporations "having capital or property employed or used *in this Commonwealth*." The Supreme Court, in construing this section, had held that personal property outside the State was not subject to taxation thereunder, and compelled deductions for the value of such property to be made where erroneously included in assessments of the capital stock of corporations. In *Commonwealth vs. Delaware, Lackawanna & Western R. R. Co., 145 Pa. 96*, it was said:

"The capital of such company, invested in real estate and other railroads outside the State, and in vessels, barges and tugs, built, registered and used wholly outside the State, is not subject to such taxation; the said property being already taxable in the States where it exists and is used."

Prior to the enactment of the Pennsylvania statute of 1891, it was held in *Commonwealth vs. American Dredging Co., 122 Pa. 386*, as shown in the syllabus, that:

1. "A corporation is not liable to taxation in this State upon so much of its capital stock as is represented by real estate situated, or by personal property of a corporeal nature ordinarily kept, in another State.

2. "But its *unregistered vessels, not permanently located, in one place to-day and in another to-morrow*, have their situs for taxation in this State, the domicile of their owner."

Under the statute of Pennsylvania and the uniform construction given thereto, the coal itself sought to be taxed was clearly exempt from taxation, and this was conceded of record by counsel for the State; and this court correctly held that to permit it to be taxed indirectly in the assessment of the company's capital stock, when it could not lawfully, under the statute aforesaid, be taxed directly, would amount to depriving the company of its (exempt) property without due process of law, in violation of the Fourteenth Amendment. In this light the meaning and effect to be given to many of the expressions in the opinion of Mr. Justice Peckham may be more readily understood.

This decision as to the thing adjudicated is in harmony with prior decisions of this court. Had there been in that case a positive statute of Pennsylvania like Section 4020, Kentucky Statutes, taxing the personal property of all resident individual and corporate owners, whether such property was in or out of that State, the coal situated in New York, and Illinois, belonging to the railroad company, would have been held subject to taxation by Pennsylvania. In such case, the owner would not be deprived of its property without due process of law. The law would not have been given any extraterritorial effect upon the *property* located in other States, but would have operated directly upon the *person* of the owner, residing in Pennsylvania, and such other estate as the railroad company may have owned in that State. This is certainly true, unless this court by that decision intended to make a new departure, and set a precedent which should serve to overrule all prior decisions and the well established doctrine that the State of the owner's domicile has power and jurisdiction (founded on the protection of his person) by express statute to tax his personal estate, tangible as well as intangible, regardless of where the same may be situated. That such was the intention of this court in rendering that decision we cannot believe.

But that case may be distinguished from the one at bar in several particulars:

1. Here there is a positive statute authorizing the tax, as construed by the highest court in the State of Kentucky, while none existed there, but, on the contrary, the statute by its own terms, as construed by the Supreme Court of the State of Pennsylvania, and as conceded by counsel for that State, exempted the personal property situated in other States and sought to be taxed.

2. Here the cars taxed have no abiding place or permanent situs in any State, while the coal there had left the State of the owner's domicile, never to return, and had acquired a permanent situs in other States.

3. Here, except in isolated instances, only a small number of the cars of plaintiff in error has been taxed by any other State, while there the coal was all assessed and taxed in other States, where it was situated, and such taxes were actually paid by the owner.

It is insisted in behalf of plaintiff in error that Section 4020 of the Kentucky Statutes, as construed by the Kentucky Court of Appeals, operates to deprive it of the equal protection of the laws, in that, while under Section 4096 railroad companies are taxed upon a portion only of their rolling stock, if they operate both within and without the State, plaintiff in error, with other individuals and corporations similarly situated, is compelled to pay taxes upon all of its cars; and it is asserted that the subject of the taxation, namely, cars, being the same in each case, the classification is based upon the mere difference in ownership, and is, therefore, violative of that clause of the Fourteenth Amendment which guarantees to every person within the jurisdiction of a State the equal protection of the laws.

Great reliance is placed upon the two cases decided at circuit by Mr. Justice Field, *County of San Mateo vs. Southern Pacific Railroad Company*, 13 Fed. Rep. 722, and *County of Santa Clara vs. Southern Railroad Company*, 18 Fed. Rep. 385.

It will be remembered that in those two cases the question was whether or not certain provisions in the Constitution of the State of California denied to the railroads the equal protection of the laws. Those provisions, in substance, after declaring that the interest of the holder of a mortgage on land should be considered as an interest in the land itself, provided that in the assessment of mortgaged lands, except such as were owned by railroads and other quasi public corporations, the amount of the mortgage should be deducted from the entire value of the land.

It is thus apparent that an additional burden of taxation was imposed upon railroad companies, affecting not only the mortgaged lands used by them for railroad purposes, but also any other mortgaged lands they might own, as compared with other owners

of mortgaged lands. In each of these two cases it was held that the provision of the State Constitution aforesaid was in conflict with the clause in the Fourteenth Amendment in question, and we have no quarrel with the doctrine of those cases that a classification for purposes of taxation based solely upon difference in ownership is invalid because in conflict with the constitutional provision aforesaid.

But that doctrine has no application to the question presented by the case at bar. Here the classification is founded, not upon ownership, but upon the *use* to which the subject of taxation is put. In the one case the Commonwealth of Kentucky, through Section 182 of the Constitution, and Section 4096 of the Statutes, which, it will be remembered, is a part of the Constitution "until otherwise provided" by the legislature, has in effect said to railroad companies doing an interstate business, that in consideration of the public service performed by the railroad companies there should be exempt from taxation all except a definite portion of their rolling stock.

To all individuals or corporations not railroad companies, none of which perform any public service, it has declared, in Sections 170, 171, 172, 173, 174 of the Constitution, and in Section 4020 of the Statutes, that all property situated within the State and all personal property, wheresoever situated, owned by individuals resident in the State, or by corporations created by the State, shall be taxed equally and uniformly upon its fair cash value. In other words, it is certain that the State of Kentucky has, by its fundamental law, Section 182, and its Statute law, Section 4096, exempted from taxation, until otherwise provided by the legislature, a certain estimated portion of the rolling stock of the railroad companies. As heretofore shown, Section 4096 is the same, merely re-enacted, statute as Section 1 of the Act of April 3, 1878, which was passed upon by this court in the *Kentucky Railroad Tax Cases*, 115 U. S. 322, and it has thus been the law of the State for more than twenty-seven years.

Nor is the exemption in favor of interstate railroads the only one contained in the Constitution of 1891, for in Section 170 we find an enumeration of various kinds of property that shall not be taxed, the exemption being based in each case upon the *use* made of the property.

Thus, the business house in a city owned by an orphan asylum, the income of which is applied to a purely public charity, is not taxable, whereas the adjoining house, in every respect like the other, owned by another person for gain, is taxable. And this basis for classification has been universally recognized as sound.

For the purposes of taxation, railroads constitute a natural class. As was said by this court, in *Charlotte, etc., Railroad vs. Gibbs*, 142 U. S. 386, 393:

"Though railroad corporations are private corporations, as distinguished from those created for municipal and governmental

purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise, and are vested for that purpose with special privileges. They are allowed to exercise the State's right of eminent domain that they may appropriate for their uses the necessary property of others upon paying just compensation therefor, a right which can only be exercised for public purposes. And they assume, by the acceptance of their charters, the obligations to transport all persons and merchandise upon like conditions and upon reasonable rates; and they are authorized to charge reasonable compensation for the services they thus perform."

The plaintiff in error is not a railroad company. It does not operate a railroad. It is not even a common carrier. It is under no obligation to transport all or any persons, or all or any merchandise, upon like conditions, nor is it limited by law to a reasonable charge for the use of its cars; in short, it performs no public service, and there is no public use involved in the operation of its cars.

In the words of its counsel, "it rented its cars to various shippers, who took possession of them," and it is merely the owner of the cars, without even operating them or in any manner itself using them. It, therefore, bears a like relation, in connection with its cars, in comparison with the railroad companies and their rolling stock, as does the individual owner of a business house bear to a charitable institution owning a like property.

In each case the exemption from taxation of property reasonably deemed by the State to serve a public use is based upon a reasonable classification. As the cars of the plaintiff in error are not used in a public service, and as they are not similarly situated with the rolling stock of the railroad company, it is no violation of the equal protection clause for the State to declare the one taxable and the other non-taxable.

Reliance is also placed by plaintiff in error upon *Northern Pacific R. R. Co. vs. Walker*, 47 Fed. 681. In that case it appears that the organic act of the territory of North Dakota withheld from the Legislative Assembly the power to—

"make any discrimination in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."

Land was made one of the subjects of taxation under the revenue laws. The territorial legislature had passed an act providing for certain per centum of gross earnings to be paid annually by railroad companies in lieu of taxes upon any and all property owned by them, including lands used in the operation of the railroads.

Certain of the lands of the Northern Pacific Railroad Company, not used by it in operating its railroad, were assessed for taxation, and the company filed its bill to enjoin the local officials from co-

lecting the taxes. The act of the legislature was relied upon as exempting the lands from taxation. The court, in pointing out the difference between "railroad property" and "the property of a railroad company," defined the former to be property which is essential to enable the company to discharge its functions and duties as a common carrier by rail, and which includes "the road-bed, right of way, track, bridges, stations, *rolling stock*, and such like property," continued, thus:

"On the other hand, lands owned and held for sale, or other disposition, for profit, and in no way connected with the use or operation of the railroad, *are not railroad property* in the sense mentioned, but are property of the railroad company independently of its functions and duties as a common carrier. The railroad company, as owner of the railroad, owes many duties to the public in reference to that property and its use. It must keep its road in operation, carry all freight and passengers offering, and must perform this service without partiality or discrimination, and for a reasonable compensation. It owes other duties to the public as owner of the railroad, which need not be enumerated. But as owner of these lands it owes no legal duty to the public in respect to them, except to pay the taxes on them. It may hold, lease, or sell them; it may sell them for the highest price it can obtain, or may decline to sell, lease, or improve them on any terms. Its relation to these lands in the respects mentioned is the same that a natural person sustains to the lands he owns."

The court then held that, though the railroads might be classed by themselves for purposes of taxation, and taxed by a method applicable to them alone, still that classification and method of taxation must be restricted to what is *railroad property*, and could not be extended to lands which have no relation to the railroad or its use or operation. Nevertheless, the court declared that "railroad property," as above defined, which included rolling stock, might be taxed by a different method or rule from that applied to other property, saying:

"This may be done because it is unlike other property. It is the difference in the *character*, *condition* and *use* of this kind of property from other property that justifies the difference in classification, and the mode of taxation. Property of the same kind, in the same condition, and used for the same purpose must be taxed by a uniform rule, without respect to its ownership."

The court then simply held, what was in reality the only question before it, that the lands of the company not used for railroad purposes could not be exempted from taxation, while lands of other owners were subject to taxation, but the decision was based upon the point that, as to these lands, the railroad company owed no duty to the public except to pay taxes on them, and that its relation to these lands was the same that a natural person sustained to those he owned. As to the "railroad property," the

court clearly distinguished its nature and character both from the lands owned by the railroad company, and from lands owned by other persons.

In the same manner, plaintiff in error, as to its cars, owes no duty to the public except to pay taxes on them.

The other authorities relied on in behalf of plaintiff in error follow in the line of the California cases, *supra*, and need not be further considered.

It is unnecessary to burden the court with further argument upon this point, and yet it may not be improper to remind the court of the many cases in which it has sustained the power in the State to impose taxes in aid of the construction of railroads, though owned by private corporations.

Olcott vs. The Supervisors, 16 Wallace, 678, is a leading case wherein it was said that, since a railroad is a public highway, and the agency operating it is a common carrier, the building of the railroad is an act done for a public use, and the operation of it serves a public use, and that taxes in aid of such uses had been immemorially imposed, because the public had a right to avail itself of the facilities of such railroads for passage and transportation. *Ibid.* 695, 696.

That the power in the State to exempt from taxation property employed in a public use is at least as extensive as the power to tax in aid of such public use, is a proposition equally well recognized.

Under Section 4096, all the railroads in Kentucky, operating in that State and elsewhere, are exempted from paying taxes on a portion of their railroad property, *i. e.* rolling stock, and all railroad companies within that class enjoy the same exemption as to property of the same kind, in the same condition, and used for the same purpose, and inasmuch as the cars (not railroad property) of plaintiff in error, though perhaps of the same kind, are not used for the same purpose, they may be taxable without a denial to plaintiff in error of the equal protection of the laws under the Fourteenth Amendment.

For the reasons urged and upon the authorities cited, we respectfully ask that the judgment of the Court of Appeals of Kentucky herein be affirmed.

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SAMUEL B. KIRBY,
ROBERT W. BINGHAM,
Counsel for Defendants in Error.

When the same question came before this court in *McHenry vs. Alford*, 168 U. S. 651, upon certificate from the Circuit Court of Appeals for the Eighth Circuit, it was held, repudiating the conclusion of the Circuit Court in the Walker case, *supra*, that the provision of the legislative act under consideration undoubtedly exempted from taxation, in any other manner than under the gross earnings rule, all the lands owned by the Northern Pacific Railroad Company, upon the ground that they were all used in producing the gross earnings of the railroad, and it was further held that said provision did not violate either the organic act of the Territory or the Fourteenth Amendment. In the course of the opinion the court, through Mr. Justice Peckham, said, at page 666:

> "While we agree that property of the same kind and "under the same condition and used for the same purpose "cannot be divided into different classes for purposes of taxa- "tion and taxed by a different rule simply because it belongs "to different owners, yet, where the situation and the possible "use and the present condition of the ownership of lands are "wholly different, such as they are in this case, from ordinary "ownership, a classification is not arbitrary nor unreasonable "which places such lands outside the class of lands owned in "the ordinary way by individuals."

APPENDIX.

COMMONWEALTH, BY, ETC., VS. UNION REFRIGERATOR TRANSIT COMPANY.

(Filed May 5, 1904.)
Reported in 26 Ky. Law Rep. 23-28, 80 S. W. 490.

1. TAXATION—DOMESTIC CORPORATIONS—REFRIGERATOR CARS—IN USE OUT OF THE STATE.

Under Section 4020, Kentucky Statutes, providing "that all real and personal estate within this State, and all the personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, shall be subject to taxation unless the same shall be exempt by the Constitution," and Id., Section 4022, providing that "for the purpose of taxation, real estate shall include all lands within this State and improvements thereon, and personal estate shall include every other species and character of property," the appellee being a corporation organized under the laws of this State, all of its refrigerator cars which it leases out to various parties, whether in this State or out of it, are subject to taxation.

2. CONSTITUTION—UNIFORM TAXATION.

Under Section 171, Kentucky Constitution, providing "that taxes shall be uniform on all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws," does not limit the power of taxation to property actually within the territorial limits of the taxing jurisdiction. The subject-matter of this section is uniformity, and it does not attempt to enumerate the subjects of taxation, but Id., Section 172, does provide what property shall be taxed, viz.: "All property not exempted from taxation by the Constitution shall be assessed for taxation."

3. DISCRIMINATION—FOURTEENTH AMENDMENT—EQUAL PROTECTION.

The fact that all of appellee's cars are taxed, whether in this State or not, while in assessing the property of railroads the cars in use out of the State are omitted, is not an unjust discrimina-

tion against appellee, or in violation of the Fourteenth Amendment of the Federal Constitution as to the "equal protection" of the law, as railroad corporations occupy an unique position in our fiscal system, and are, by the express language of the Constitution, taken out of the category of other property as to the manner in which they are to be taxed.

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SAMUEL B. KIRBY,
For Appellants.

FORCHT & FIELD,
HUMPHREY, BURNETT & HUMPHREY,
For Appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

The appellee, Union Refrigerator Transit Co., is a corporation organized under the laws of this Commonwealth, having its home office in Crescent Hill, Jefferson County, Kentucky, and its principal place of business in St. Louis, Mo. It is the owner of two thousand refrigerator cars, which it leases out to various parties needing them for the preservation of their goods while in transit through the United States, Mexico and Canada. These cars are about the value of $200 each.

This proceeding was instituted by the auditor's agent of Jefferson County, under Section 4241, Kentucky Statutes, for the purpose of forcing appellee to list its cars for State and county taxation; this was resisted by the appellee before the County Court, with the result that a judgment was rendered requiring it to list such a proportion of its cars as, under a system of averages, were shown to be used in the State of Kentucky during the fiscal year; the remainder were held not to be subject to taxation here. From this judgment the Commonwealth appealed to the Jefferson Circuit Court, where the judgment of the County Court was affirmed. To reverse these judgments this appeal is prosecuted.

There is no complaint in this record of a want of regularity in the proceedings, the question for adjudication being, whether or not all of the cars owned by appellee, whether in or out of this State, are subject to taxation here. It is insisted by appellee that such of its cars as are used in foreign commerce are not subject to taxation in Kentucky under the language of the statute; and that, if they are so taxable, then the statute is void. because violative of the State Constitution and of the Fourteenth Amendment of the Federal Constitution. Of these, in their order, the following sections of the Kentucky Statutes are applicable to the subject in hand:

"Section 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

"Section 4022. For the purpose of taxation, real estate shall include all lands within this State and improvements thereon; and personal estate shall include every other species and character of property, that which is tangible as well as that which is intangible."

The slightest examination of these sections shows that they leave nothing for construction. Appellee being a corporation organized under the laws of this State, its personal property, whether tangible or intangible, and whether in or out of the State, must be taxed here by the terms of the law. With the question of whether or not the modern tendency of legislative enactment and judicial construction is to trench upon the legal maxim *mobilia sequuntur personam*, we have nothing to do; and it may be, therefore, freely conceded, for the purposes of this case, that all that is said in this regard by counsel for appellee is true. Our State upholds and enforces the ancient fiction in all its original severity; and we do not understand that it is open to us to destroy, by construction, the integrity of a statute, the words of which are so plain that "he who runs may read." And whatever may be said as to the judicial utterances of other jurisdictions, our court has uniformly held, that for the purpose of taxation the situs of personal property of every description is the domicile of the owner. The case of *Wren vs. Boske, Sheriff, 24 Ky. Law Rep., 2d part, p. 1780*, presented this state of facts: The appellant, Wren, resided in Scott County; he owned a farm in Kenton County, upon which he had horses, mules, cattle and sheep, which had been there for eight years. This personal property he listed with the assessor of Scott County, where he resided; but notwithstanding this, it was assessed for taxation in Kenton County, and he instituted an action to restrain the sheriff of Kenton County from selling it for taxes. This court said: "It is conceded that the stock had obtained a situs in Kenton County, and if personal property in this State which has obtained a situs in a county other than that of the owner's residence, may be assessed in that county, although the owner gives it in for taxation in the county of his residence, then the judgment of the Circuit Court dismissing the plaintiff's petition is right. We are referred to a number of decisions holding that personal property of non-residents of the State, which has obtained

a situs in the State, may, if the legislature so provides, be taxed in that State, and the same rule no doubt would apply between the different counties of the same State if the legislature so provided. But the question, after all, is one of legislative intent."

The court then held that the property could only be taxed at the domicile of the owner.

In the case of *Langdon-Creasy Co. vs. Trustees of Owenton Common School District, etc., 25 Ky. Law Rep., part 1st, p. 823*, it appears that the corporation had its domicile in Covington, Ky.; it also had a retail grocery store in Owen County, Ky., where its goods were sought to be taxed for local purposes. This court held, approving Wren vs. Boske, Sheriff, that the personal property of the corporation was only taxable in the county of its residence. It was said: "As appellant corporation has a legal residence, and not being in the class of corporations which are required to report to the auditor, it must be assessed in the same manner as that of a natural person. It seems to us that there is no escape from this conclusion. The legislature has the unquestioned authority to fix the situs of property for the purpose of taxation. * * * The case of Wren vs. Boske is made to turn upon the legislative intent, and this case is likewise made so to turn."

In the case of *Gates vs. Barrett, 79 Ky. 295*, it is said: "In general, movable property is to be assessed for taxation at the place of the owner's residence." (*Boske, Sheriff, vs. Security Trust and Safety Vault Co., 22 Ky. Law Rep., 181; Covington vs. Wayne, 22 Ky. Law Rep., 826; City of Louisville vs. Shirley, 80 Ky. 71.*)

In *Cooley on Taxation, 3d Ed., Vol. 1, p. 86*, the rule is stated: "If a person is domiciled within the State, his personalty, in contemplation of law, has its situs there also, and he may be taxed in respect of it at the place of his domicile. * * * However, the maxim *mobilia sequuntur personam* is not of universal application, does not rest on any constitutional foundation, and gives way before express laws; and a State may, at its option, impose taxes on tangible personal property within its limits irrespective of the residence or allegiance of the owner, although this would not be true of property merely passing through the State and not having a situs therein."

Id., 673: "The proper place for the taxation of a corporation in respect of its personalty is the place of its principal office, unless some other rule is prescribed by statute."

In *Burroughs on Taxation, p. 186*, the rule is thus stated: "A corporation is taxable for its personal property at its domicile, which is the State of its creation, and within that State, in the town where it has its principal office or place of business."

In the *Am. and Eng. Encycl. of Law, 1st Ed., Vol. 25, p. 133*, it is said: "In the taxation of personal property, two inconsistent

doctrines often come into conflict, the one *mobilia sequuntur personam*, demanding that the property shall be taxed at the owner's domicile, on the theory that personalty has no other situs; the other, that it should be taxed like real property, where it is situated. Ordinarily the first rule will prevail, and, as a general rule, personal property is taxable at the domicile of its owner. This is often so provided by statute. The State may, however, and often does, make it taxable at its actual situs. The fact that double taxation may result from the assessment in two States does not affect the validity of the assessment."

It is urged, however, that the statute which requires movable personal property, situated in a different jurisdiction, to be taxed at the domicile of the owner is invalid, as being in contravention of the provisions of Section 171 of the Constitution, which is as follows: "The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

It is said that the language "they shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax" limits the power of taxation to property actually within the territorial limits of the taxing jurisdiction. This, we think, is erroneous. The subject-matter of the language in question is uniformity. There is no attempt to enumerate the subjects of taxation. Nor can the language be read as if it was said that taxes shall be uniform upon all property within the territorial limits of the authority levying the tax. The language is, that taxes shall be "uniform upon all property subject to taxation," leaving the question as to what property is subject to taxation undetermined. Section 172, however, does provide what property shall be taxed. It is as follows: "All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale." * * * This language needs no construction, and it requires that all property of which the State has jurisdiction, except that which is exempted shall be taxed; and, instead of limiting the subjects of taxation to personal property having an actual situs within the territorial limits, the section extends the zone of taxation, until it equals that of jurisdiction.

Nor can it be maintained that the statute is invalid for the reason that it denies to the owners of such personal property "the equal protection of the laws." This precise question arose in the case of *Coe vs. Errol, 116 U. S. Rep. 524*. There the question was whether certain logs, which were situated within one State,

could be taxed therein, when they were also taxed in the State where the owner resided. And it was said by the court: "We have no difficulty in disposing of the last contention of the question, namely, the fact (if it be a fact) that the property was owned by persons residing in another State; for if not exempt from taxation for other reasons, it cannot be exempted by reason of being owned by non-residents of the State. We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory, which do not belong to some other jurisdiction; such as the representatives of foreign governments with their houses and effects, and property belonging to or in the use of the government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as a part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary. The fact, therefore, that the owners of the logs in question were taxed for their value in Maine, as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case, and may be laid out of view."

In the case of *Blackstone vs. Miller, 188 U. S. Rep. 202*, the question for adjudication was, whether a law which taxed the succession to a tangible chattel at the situs of the chattel was valid, when it appeared that the same subject was taxed at the domicile of the owner. The court said: "To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is a part of a *universitas* and is taken into account again in the succession tax there. * * * No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing, on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in succession after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law."

In the case of *Kidd vs. Alabama, Id. 730*, the question was, whether or not the fiscal laws of Alabama, which undertook to tax shares of stock in railroads held by residents of the State (the railroads being situated in other States), were inimical to the Fourteenth Amendment of the Constitution of the United States. In answering the argument that they were invalid, the court said: "We say that the State, in taxing stock, may take

into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed because they are not taxed by the State in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the State of Alabama is not concerned. No doubt it would be a great advantage to the country, and to the individual States, if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far. * * * The State of Alabama is not bound to make its laws harmonize in principle with those of other States. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all."

These opinions of the Supreme Court of the United States not only clearly recognize the right of the State to enforce the maxim *mobilia sequuntur personam* in fiscal matters in its original vigor, but they clearly deny that, in so doing, it contravenes the provision of the Fourteenth Amendment of the Constitution of the United States.

It is said that the fact that all of the appellee's cars are taxed, whether in this State or not, while in assessing the property of railroads, the cars in use out of the State are omitted, is an unjust discrimination against it, and is violative of the Fourteenth Amendment as to the "equal protection" of the laws. Railroad corporations occupy an unique position in our fiscal system. They are, by the express language of the Constitution, taken out of the category of other property as to the manner in which they are taxed; but, in so doing, it is not intended to violate the fundamental principle of the Constitution as to uniformity in taxation, but on the contrary, to enforce and secure it; and it is confidently believed that the system devised does accomplish the end desired as nearly as may be. We will not burden this opinion with any attempt to show the reasons for the distinction in the fiscal law as to railroads, nor the fact that they are not unduly favored in their isolation; these are obvious, and this court has uniformly held the validity of the statute which provides and enforces the anomalous mode of taxation applicable to them. *Kidd vs. Adams, supra*, and the *Kentucky Railroad Tax Cases, 115 U. S. Rep. 321*, are conclusive of the Federal question.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

COMMONWEALTH, BY, ETC., VS. UNION REFRIGERATOR TRANSIT COMPANY.

(Filed June 16, 1904.)
Reported 26 Ky. Law. Rep., 397.

Henry L. Stone and Samuel B. Kirby for appellant.

Humphrey, Burnett & Humphrey and Forcht & Field for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Judge Barker delivered the following response to petition for rehearing.

As the record shows, without contradiction, that appellee owned two thousand cars of the value of $200 each on the assessment day of each year in which they are sought to be taxed by this proceeding, the opinion is extended so as to require the lower court, upon the return of the case, to enter a judgment against appellee for the amount due upon the above-named property for taxes for the respective years, at the legal rate of taxation for each year, with legal penalties.

The petition for rehearing is overruled.

AUTHORITIES CITED.

STATEMENT.

Commonwealth, by, etc., vs. Union Refrigerator Transit Co., 26 Ky. Law Rep. 23-28, 80 S. W. 490.

I

THE GENERAL ASSEMBLY OF THE STATE OF KENTUCKY HAD POWER AND JURISDICTION TO PROVIDE THAT THE PERSONAL PROPERTY OF ALL RESIDENTS OF THAT STATE OR OF CORPORATIONS ORGANIZED UNDER THE LAWS OF THAT STATE, WHETHER IN OR OUT OF THAT STATE, SHOULD BE TAXED IN THAT STATE.

Secs. 4241, 4020, 4096, Carroll's Ky. Stats., Ed. 1903.
Cooley on Taxation (3rd Ed.), Vol. 1, p. 86.
Commonwealth vs. Hays, 8 B. Mon. 1.
2 Stanton's Rev. Stats. of Ky., pp. 253-4.
Barret & Co. vs. City of Henderson, and City of Henderson vs. Barret, 4 Bush, 255.
Sec. 12, Art. 1, Gen. Stats. of Ky., Ed. 1887, p. 1038.
Cooley on Taxation (3rd Ed.), p. 644.
Boyd vs. Selma, 96 Ala. 150.
Kirtland vs. Hotchkiss, 100 U. S. 491.
Goldgart vs. People, 106 Ill. 25.
Foresman vs. Byrns, 68 Ind. 247.
Lose vs. State, 72 Ind. 285.
Griffith vs. Watson, 19 Kan. 23.
Frothingham vs. Snow, 175 Mass. 59.
Horn vs. Green, 52 Miss. 452.
Cooley on Taxation (3d Ed.), Vol. 1, pp. 673-4.
Am. and Eng. Enc. of Law, Vol. 25, title, "Taxation," p. 152.
Burroughs on Taxation, p. 186.
Pullman Palace Car Co. vs. Pennsylvania, 141 U. S. 18-36.
Pacific National Bank Co. vs. Pierce Co., 20 Wash. 675, 50 Pac. 936.
State vs. Branin, 23 N. J. L. 484.
People *ex rel.* New York C. & H. R. R. R. Co. vs. Roberts, 32 App. Div. 113, 52 N. Y. Supp. 859.
Tennessee vs. Whitworth, 117 U. S. 136.
People *ex rel.* Savings Bank vs. Coleman, 135 N. Y. 231.
Bradley vs. Bauder (Ohio), 19 Am. L. Reg. N. S. 774.
Grigsby Construction Co. vs. Freeman, 108 La. Ann. 435, 58 L. R. A. 349.

State of Indiana vs. Pullman Palace Car Co., 16 Fed. 193.
Pullman's Southern Car Co. vs. Nolan, 22 Fed. 276.
Irwin vs. New Orleans, St. Louis & C. R. Co., 94 Ill. 105, 34 Am. Rep. 208.
Appeal Tax Court of Baltimore City vs. Pullman Palace Car Co., 50 Md. 452.
State *ex rel.* Stephens, 146 Mo. 662.
American Refrigerator Transit Co. vs. Hall, 174 U. S. 70-82.
Union Refrigerator Transit Co. vs. Lynch, 177 U. S. 149.
Norfolk & Western Railway Co. vs. Board of Public Works, 97 Va. 23.
Commonwealth vs. American Dredging Co., 122 Pa. St. 386.
In re Swift's Estate, 137 N. Y. 77.
Leonard vs. City of New Bedford, 16 Gray, 292.
Appeal Tax Court of Baltimore vs. Western Maryland R. R. Co., 50 Md. 274.
Appeal Tax Court of Baltimore City vs. Northern Central R. R. Co., 50 Md. 417.
Union Refrigerator Transit Co. vs. Lynch, Treasurer, 18 Utah 378, 48 L. R. A. 790.

II.

THE PLAINTIFF IN ERROR IS NOT DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, NOR DENIED THE EQUAL PROTECTION OF THE LAWS BY SECTION 4020, KENTUCKY STATUTES, WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Florida Central & Peninsula R. Co. vs. Reynolds, 183 U. S. 474.
King vs. Mullins, 171 U. S. 436.
Judson on Taxation, Sec. 437, p. 562.
Head Money Cases, 112 U. S. 595.
Bell's Gap R. Co. vs. Pennsylvania, 134 U. S. 233.
Merchants' & Manufacturers' Bank vs. Pennsylvania, 167 U. S. 464.
Columbus Southern R. Co. vs. Wright, 151 U. S. 478.
Kentucky Railroad Cases, 115 U. S. 321.
Charlotte C. & A. R. Co. vs. Gibbes, 142 U. S. 386.
Louisville & Nashville R. Co. vs. City of Louisville, 16 Ky. Law Rep. 796.
Kidd vs. Alabama, 188 U. S. 730-33.
Wright vs. Louisville & Nashville R. Co., 195 U. S. 219.
Sections 171, 182, Constitution of State of Kentucky.
Kirtland vs. Hotchkiss, 100 U. S. 491.
State Railroad Tax Cases, 92 U. S. 607-8.
Marye vs. Baltimore & Ohio Railroad, 127 U. S. 117.

Pullman Palace Car Co. vs. Pennsylvania, 141 U. S. 29.
Davidson vs. New Orleans, 96 U. S. 77, 106.
Dyer vs. Osborne, 11 R. I. 321.
People vs. The Home Ins. Co., 92 N. Y. 347, affirmed in 119 U. S. 129.
Louisville & Nashville R. Co. vs. Kentucky, 183 U. S. 512.
Blackstone vs. Miller, 188 U. S. 189.
Louisville and Jeffersonville Ferry Co. vs. Commonwealth of Kentucky, 188 U. S. 385.
Delaware, Lackawanna & Western R. R. Co. vs. Pennsylvania, 25 Sup. C. Rep. 669.
Commonwealth vs. Delaware, Lackawanna & Western R. R. Co., 145 Pa. 96.
Commonwealth vs. American Dredging Co., 122 Pa. 386.
County of San Mateo vs. Southern Pacific R. Co., 13 Fed. 722.
County of Santa Clara vs. Southern Pacific R. Co., 18 Fed. 385.
Charlotte, etc., Railroad vs. Gibbs, 142 U. S. 386, 393.
Northern Pacific R. Co. vs. Walker, 47 Fed. 681.
Olcott vs. The Supervisors, 16 Wall. 678, 695.
McKeen v. Alford, 168 U.S. 651.